TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1952

LIBRARY
SUPREME COURT, U.S.

No. 40

MARGARET JOHNSON, AS ADMINISTRATRIX OF THE GOODS, CHATTELS AND CREDITS OF CHARLES JOHNSON, DECEASED, PETITIONER,

vs.

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD CO.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED APRIL 22, 1952

CERTIORARI GRANTED JUNE 9, 1952

INDEX.

	PAGE
Statement Under Rule 15(b)	1
Amended Summons	3
Amended Complaint	4
Answer	6
Testimony	8
Motion to Amend Complaint—Granted	9
Motion to Dismiss Complaint	102
Renewal of Motion to Dismiss Complaint and Motion for Directed Verdict	133
Statement by Court	133
Charge of the Court	135
Request to Charge	143
Verdict	144
Motion to Set Aside Verdict—Denied	145
Judgment	158
Decision-Opinion of Abruzzo, *D. J.*, Denying Motions of Defendant	159
Order Denying Defendant's Motions Appealed From	164
Notice of Appeal	166
Stipulation as to Exhibits	168
Stipulation as to Record	169
Clerk's Certificate	170
Proceedings in U.S.C.A. for the Second Circuit	171
Opinion, Swan, J.	171
Judgment	176
Clerk's certificate (omitted in printing)	176
Order allowing certiorari	177

PLAINTIFF'S WITNESSES:

	PAGE
Salvator Gaglio:	
Direct	9
Cross	45
John J. O'Brien:	
Direct	47
Cross	65
Re-direct	72
(Recalled)	
By the Court	91
Direct	92
Cross	92
Charles F. Holmes:	
Direct	75
Cross	87
Margaret Johnson:	
Direct	93
Cross	97
Re-direct	100
(Recalled)	
Cross	119
Audrey Johnson:	
Direct	101

DEFENDANT'S WITNESSES:

Theodore E. DeMars:	
Direct	105
Cross	110
David Rupp:	
Direct	121
Cross	128

PLAINTIFF'S EXHIBITS:

PAGE

1—Photograph of Car Float "No. 53" and "Transfer No. 10" looking south from Bridge No. 11 (photoprint), marked in evidence at folio 41 147

2—Photograph of Car Float "No. 58" and "Transfer No. 10", looking south from Bridge No. 12 (photoprint), marked in evidence at folio 43 149

3—Letters of administration, marked in evidence at folio 278 150

4—Certificate of death (photoprint), marked in evidence at folio 286 153

DEFENDANT'S EXHIBITS:

A—Photograph of apron of Bridge No. 12, looking west toward Bridge No. 11 (photoprint), marked in evidence at folio 197 155

B—Photograph of Car Float "No. 53" in Bridge No. 11 and Car Float "No. 58" in Bridge No. 12, looking northeast from "Transfer No. 10" (photoprint), marked in evidence at folio 208 157

C—Letter dated May 31, 1943, marked in evidence at folio 358 158

United States Court of Appeals

FOR THE SECOND CIRCUIT.

MARGARET JOHNSON, as Administratrix of the goods, chattels and credits of Charles Johnson, deceased,

Plaintiff-Appellee,

—against—

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY,

Defendant-Appellant.

Statement Under Rule 15(b).

This action was commenced by plaintiff in the United States District Court, Eastern District of New York, by the service of an amended summons and complaint on the defendant on March 4, 1948. The defendant served and filed its answer to the amended complaint on March 23, 1948.

The issues were tried before the Honorable Matthew T. Abruzzo and a jury on April 10, 11, 12 and 13, 1951 and resulted in a verdict in favor of the plaintiff and against the defendant in the amount of $20,000.00. The motions of the defendant for a dismissal of the complaint, for a direction of a verdict in its favor and for setting aside the verdict were denied by order of the Court entered and filed on June 29, 1951.

Statement Under Rule 15(b).

Judgment was entered on the verdict in favor of the plaintiff and against the defendant in the amount of $20,000.00 on April 13, 1951 and costs were taxed and docketed in favor of the plaintiff and against the defendant in the amount of $183.33 on June 29, 1951. The order of the Court denying the motions of the defendant for a dismissal of the complaint, for a direction of a verdict in its favor and for setting aside the verdict was filed on June 29, 1951.

The defendant filed its notice of appeal from the final judgment, from the costs as taxed and from the order denying its motion for a dismissal of the complaint, for a direction of a verdict in its favor and for setting aside the verdict on July 6, 1951.

Plaintiff appeared by her attorneys, David M. Fink and Jacquin Frank, of 141 Broadway, New York City.

Defendant appeared by its attorney, Edward R. Brumley, of Room 3841, Grand Central Terminal, New York City.

There has been no change in parties or attorneys since the commencement of this action.

Amended Summons.

DISTRICT COURT OF THE UNITED STATES,

FOR THE EASTERN DISTRICT OF NEW YORK.

CIVIL DIVISION.

Civil Action File No. 8871.

Plaintiff hereby demands a trial by jury.

MARGARET JOHNSON, as Administratrix of the goods, chattels and credits of Charles Johnson, deceased,

Plaintiff,

v.

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY,

Defendant.

To the above named Defendant:

You are hereby summoned and required to serve upon plaintiff's attorney, whose address is

David M. Fink & Jacquin Frank
291 Broadway
New York City.

an answer to the amended complaint which is herewith served upon you, within 20 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

PERCY G. B. GILKES,
Clerk of Court.

By NAN V. McNABB,
Deputy Clerk.

Date: March 3, 1948.

[Seal of Court]

10 **Amended Complaint.**

Plaintiff demands trial by jury.

[SAME TITLE.]

Plaintiff, complaining of the defendant, by David M. Fink & Jacquin Frank, her attorneys, respectfully alleges and shows to this Court for an amended complaint:

First: That prior to the commencement of this action,
11 and in and by a Decree duly made and entered in the office of the Clerk of the Surrogate's Court in and for the County of New York, on the 21st day of January, 1948, Margaret Johnson was duly appointed Administratrix of the goods, chattels and credits of Charles Johnson, deceased, and has duly qualified and is now acting as such.

Second: Upon information and belief, that the defendant New York, New Haven and Hartford Railroad Company is a corporation duly organized and existing under and by virtue of the laws of the State of Con-
12 necticut, and has an office and place of business in the City of New York.

Third: That at and during all the dates and times hereinafter mentioned, the defendant owned, operated and controlled the steam tug "Transfer No. 10".

Fourth: That at and during all the dates and times hereinafter mentioned, plaintiff's intestate, Charles Johnson, was a seaman in the service of the said vessel, and employed by the defendant herein.

Amended Complaint.

Fifth: That at and during all the dates and times hereinafter mentioned, the defendant owned, operated and controlled the railroad yard situated at Oak Point, in the County of Bronx, City and State of New York, together with all its bridges, piers, appurtenances and equipment thereof.

Sixth: That at and during all the dates and times hereinafter mentioned, the defendant owned, operated and controlled carfloats which, at the time hereinafter mentioned, were about to be transferred from Oak Point to Pier 3, Gates Dock, located on the Harlem River, in New York City.

Seventh: That on or about the 22nd day of April, 1946, while plaintiff's intestate, Charles Johnson, was engaged in his duties and assisting in the removal of two carfloats from the railroad yard piers at Oak Point, County of Bronx, City of New York, and acting as floatman, he was caused to be precipitated into the river, as a result of which he was drowned on the same day. That the defendants, their agents, servants and employees, recklessly, carelessly and negligently operated the tug in the operation of removing the floats, and failed to give the plaintiff's intestate a reasonable opportunity to remount the carfloat; failed to furnish him with a safe and secure place in which to work, and caused the said tug to be started in such a manner that it caused plaintiff's intestate to be precipitated into the river, as a result of all of which plaintiff's intestate was drowned.

Eighth: That plaintiff's intestate left surviving him Margaret Johnson, widow, Charles Johnson, son and Audrey Johnson, daughter, who have incurred funeral expenses and suffered damages in a total amount of Seventy-five thousand dollars ($75,000).

16 WHEREFORE, plaintiff demands judgment against the defendant in the sum of Seventy-five thousand dollars ($75,000), with interest from the 22nd day of April, 1946, together with the costs and disbursements of this action.

DAVID M. FINK & JACQUIN FRANK,
By JACQUIN FRANK,
A member of the Firm
Attorneys for Plaintiff,
Office & P. O. Address,
291 Broadway,
New York City.

17

Answer.

[SAME TITLE.]

The defendant above named, by its attorney, Edward R. Brumley, for its answer to the amended complaint

First: Denies knowledge or information sufficient to
18 form a belief as to the truth of the allegations contained in paragraphs designated "First" and "Eighth" of the amended complaint.

Second: Admits the allegations contained in paragraph designated "Second" of the amended complaint.

Third: Denies the allegations contained in paragraphs designated "Third", "Fourth", "Fifth", "Sixth" and "Seventh" of the amended complaint.

Answer.

FOR A SEPARATE ANSWER AND DEFENSE, THE DEFENDANT ALLEGES:

First: That whatever injuries decedent may have received at the time and place mentioned in the amended complaint, and whatever damages the plaintiff may have sustained because thereof, resulted from the failure of the decedent to exercise due care and diligence in the performance of his duties, his own negligence and carelessness contributing thereto.

WHEREFORE, defendant demands judgment dismissing the amended complaint herein, with costs.

EDWARD R. BRUMLEY,
Attorney for Defendant,
Office and Post Office Address,
Room 3841, Grand Central Terminal,
Borough of Manhattan,
New York 17, N. Y.

Testimony.

[SAME TITLE.]

Brooklyn, New York, April 10, 1951.

Before—HONORABLE MATTHEW T. ABRUZZO, *U. S. D. J.*, and a Jury.

APPEARANCES:

DAVID M. FINK, Esq., and JACQUIN FRANK, Esq., Attorneys for the Plaintiff, by Jacquin Frank, Esq., of Counsel.
EDWARD R. BRUMLEY, Esq., Attorney for the Defendant, by Robert Peet, Esq., of Counsel.

(A jury was duly empaneled and sworn.)

The Court: We will take a five-minute recess.
(Short recess.)
The Court: All right, Mr. Frank.
(Mr. Frank opened on behalf of the plaintiff to the jury.)
(Mr. Peet then made his opening statement to the jury.)
(At 12:30 o'clock, the Court was recessed until 2 o'clock.)
(The following took place without the hearing of the jury.)
Mr. Frank: I have asked the stenographer to take this. On March 6th I served a notice to amend——
The Court: March 6th of this year?
Mr. Frank: This year.
Now, that was done after we got the deposition and my friend said we could have had a longer time.
The Court: The rules provide that you could, and I

have to take cognizance of that, and that is what you apparently have done,—— 25

Mr. Frank: The only part of the thing that I want to amend is paragraph 7 of the complaint, and I want to do that by adding this:

That the defendant, its officers, crew, agents, servants and employees were further negligent in failing to use reasonable efforts and exercising reasonable care in attempting to rescue plaintiff when they obtained knowledge of the fact that he was missing from the float and tug.

Mr. Peet: Well, I have no objection, your Honor, if he wants to amend in that manner.

The Court: All right, if you have no objection, then the amendment is granted. 26

(The jury took its place in the jury box and the trial continued.)

The Clerk: Johnson v. The New York New Haven & Hartford Railroad Company.

Mr. Frank: Shall I proceed, sir?

The Court: Yes.

Mr. Frank: Mr. Gaglio, will you come up here.

SALVATOR GAGLIO, called as a witness on behalf of the Plaintiff, having been first duly sworn, testified as follows: 27

Direct examination by Mr. Frank:

Q. Mr. Gaglio, may I ask you to keep your voice raised so that this last juror can hear. How old a man are you? A. 40 years old.

Q. Did you ever see me before this morning? A. No, sir.

28 Q. You are employed by whom? A. The New York New Haven & Hartford Railroad Company.

Q. And how long have you been in its employ? A. 11 years.

Q. And on April 22, 1946, what was your rating, what was your job? A. I was a mate on "Transfer No. 10".

Q. "Transfer No. 10"? A. That is right.

Q. That is a tug operated by the New York New Haven & Hartford Railroad? A. That is right.

Q. Who was your captain? A. Captain Jack O'Brien.

Q. Is he sitting there in the back of the courtroom? A. That is him.

29 Q. And how many deckmen did you have, including the captain, on that tug? A. There was three altogether, me, the second deckhand and the floatman.

Q. And the captain, Captain O'Brien, all under Captain O'Brien? A. That is right.

Q. Then you have some enginemen? A. Yes, then three men in the engineroom, an engineer, a fireman, and an oiler.

Q. April 22, 1946, was a Monday, we have determined that. A. Yes.

Q What time did you and the rest of the crew report 30 for work? A. 4:30.

Q. In the afternoon? A. That is right.

Q. You had worked late the previous Sunday? A. I don't recall.

Q. You don't recall that? A. No.

Q. All right. Now, when you reported to work, where was the tug? A. The tug was tied up.

Q. Where? A. North side of Pier 39, East River.

Q Did you see Johnson on board? A. I did.

Q. At 4:30? A. 4:30, he is supposed to be aboard.

Q. Whom did you say was the other mate, I didn't get that name? A. I was the mate.

Q. There was another man? A. That was the second deckhand. 31

Q. What was his name? A. Santalesa.

Q Santalesa? A. That is right.

Q How long had you known Johnson at the time of the accident? A. I had known him since he is on the job, since I have been there.

Q. You have been there 11 years? A. That is right.

Q. When you first got on the job was Johnson already working for the railroad? A. Oh, yes.

Q. And how long at that time, if you remember, were you on "Transfer No. 10", in other words, was that your regular boat? A. That was my regular job. 32

Q. Was Johnson one of the members of the crew of "Transfer No. 10"? A That was his regular job.

Q. And taking into account again that it was in April, 1946, how long had you been on "Transfer No. 10"—about? A. Say three months.

Q. And Johnson was there all the time you were there? A. That is right.

The Court: The answer is yes. You have to answer, not shake your head.

The Witness: I said yes, sir. 33

The Court: All right.

Q. Now, the first job that you had out at Pier 39 was what? A. We had orders to take a float from the south side of Pier 39 to Oak Point.

Q. And where is Oak Point? A. Oak Point is in the Bronx.

Q. Near what street? A. It is off 149th Street.

Q. And that is in the East River? A. That is right.

Q. And Oak Point is the railroad yards, is that not so? A. That is where the railroad yard is.

Q. A regular railroad yard? A. Yes.

34 Q. And your first order was to take a float from Pier 39, East River, up to Oak Point? A. Oak Point, yes.

Q. And where in Oak Point were you to go or did you put that float? A. No. 5 bridge.

Q. No. 5 bridge? A. That is right.

Q. Now, Mr. Peet has explained to the jury that you designate these bridges by numbers; is that correct? A. That is right.

Q. Now, the accident that we are talking about involved bridges 11 and 12; is that right? A. That is right.

Q. How far away from bridges 11 and 12 is No. 5 bridge where you delivered your first float—about? A.
35 I would say about 400 foot.

Q. Is one right alongside of the other, is that the way they were? A. There is a space in between.

Q. There is a space in between? A. A space, what we call the hole.

Q. That hole, that is where you usually load with water? A. That is right.

Q. You take water there? A. Yes.

Q. Now, in delivering this float, was that an empty float or a loaded float—the first one? A. Which one are you referring to?

36 Q. The float which you picked up at Pier 39 and delivered to 5? A. That was a loaded float.

Q. A loaded float? A. Yes.

Q. In that operation did Johnson take part? A. He did.

Q. As a floatman? A. That is right.

Q. You took part? A. That is right.

Q. And everything he did was in the usual way it is done? A. The usual way, that is right.

Q. Now, after you got through with putting that float against bridge 5, where did you go then? A. Went back to the boat.

Q. And where did the boat go? A. We let the lines

go off the float and the boat went into the hole, proceeded 37
to the hole.

Q. When you say the boat, I suppose you mean the tugboat, that is "Transfer No. 10"? A. That is right.

Q. And I assume that Captain O'Brien was in the pilot house? A. He was.

Q. You then proceeded to the hole where you—what did you do there? A. Took water and waited for orders.

Q. And were orders given you for your next job? A. Orders were—no orders were given to me.

Q. Were they given to the captain? A. They were given to the captain. 38

Q. Who brought the orders to the captain? A. I don't know.

Q. Do you know whether or not it was Johnson that delivered the orders to him? A. I don't know.

Q. You don't know? A. No.

Q. And your orders were for what? A. To take a pair of light floats out of 11 and 12.

Q. Where were you going to take them to? A. Up to Church E. Gates Dock.

Q. And approximately how far is that Gates dock away from where these empty floats were? A. Say about five blocks. 39

Q. About five blocks did you say? A. Yes.

Q. Now, about what time was it when you proceeded from the hole in order to take those empty floats away from bridges 11 and 12? A. I would say approximately about six, a little after.

Q. Was it a clear day? A. Very clear.

Q. Light? A. Very light.

Q. And these empty floats were at bridges 11 and 12; is that right? A. That is right.

Q. I show you a photograph which has been given me by the railroad company attorney, and you can also look

40 on the markings on the back to help you to identify it. Will you look at this photograph, please?

(The photograph was handed to the witness.)

Q. You may look at the back to identify it. All those markings were made by the railroad company. Now, do you recognize that photograph? A. I do.

Q. What is that photograph of? A. A photograph of the float.

The Court: What was that?

41

A. It is a photograph of a float in 11 bridge.

Mr. Frank: I offer it in evidence.

Mr. Peet: No objection.

(Photograph of float received in evidence as Plaintiff's Exhibit 1, as of this date.)

Q. I show you another photograph. You can also look at the back for its markings. Now, tell us what that is a photograph of? A. It is a float up against a pin.

42 Q. Against what? A. Against a pin.

Q. What is a pin? A. The pin is right up against it.

Q. What is the pin? Will you tell us what the word pin means? A. The pin is the short rack.

Q. The pin is the short rack? A. That is right.

Q. And what bridge number is that which we see there? A. It is not any bridge, it is on the pin.

Q. Let me see it, please, maybe I can identify it.

(The document was handed to Mr. Frank.)

Q. What bridge is there in the foreground on this picture, what number bridge is it? A. It is not in any bridge, it is on the pin.

The Court: But can you see any bridge? 43

The Witness: It is 12 bridge.

The Court: You see 12 bridge, but you say it isn't up against 12 bridge.

The Witness: The stern is up against bridge 12. You asked me whether it is in 12, it is not in 12.

Mr. Frank: I offer it in evidence.

Mr. Peet: No objection.

(Photograph received in evidence as Plaintiff's Exhibit 2, as of this date.)

Q. Now, going back to Plaintiff's Exhibit 1—— 44

The Court: Are those the only two pictures you are going to put in evidence?

Mr. Frank: Yes, your Honor.

I was wondering whether I could explain it first and then show it to the jury.

The Court: No, show them to the jury now so they can follow you.

You look at them quickly and get a birdseye view of what they are talking about.

Let them look at them first.

(At this point the jurors examined Exhibits 1 and 2.) 45

The Court: Now, give them back to Mr. Frank.

Q. The float shown on Plaintiff's Exhibit 1 at bridge 11 is float "No. 53"; is that right? A. That is right.

Q. And that was the float, that was one of the floats that you were going to move out over to Gates' pier; is that right, is that what you call it? A. Church E. Gates dock, that is right.

Q. And the other float shown on Plaintiff's Exhibit 2 is float "No. 58"; is that right? A. That is right.

46 Q. And float "No. 58" was the other float that you were going to move over to the Gates pier; is that right? A. That is right.

Q. Now, may I see them, please.

(The photographs were handed to Mr. Frank.)

Q. This bridge that you are talking about, is that a movable bridge? A. It goes up and down.

Q. And how does it go up and down? A. By electricity.

Q. By winch, you mean? A. I don't know, it is by
47 electric it goes. It has lines there, it shows you there how the lines take up and down.

Q. What motive power is necessary to lift it? A. There is a motorman who takes care of it.

Q. Where is that man that takes care of it? A. He is up in that tower.

Q. How far away from the apron or the end of that bridge is the tower? A. The tower is right there, there is a picture of it (indicating).

Q. The picture that is seen right here (indicating)? A. It doesn't show you exactly where the tower is, it shows where the tower would be.

48 Q. Would you look and see? Can you see the tower on that picture, Plaintiff's Exhibit 1?

(The exhibit was handed to the witness.)

A. No, you cannot see the tower.

Q. It is in the back somewheres? A. Yes.

Q. How far away from the water's edge would you say that tower is? A. About eight feet.

Q. Now, are there any bridgemen stationed around these bridges? A. When they get ordered, they are sta-

tioned here, when they get ordered to, they are sta- 49
tioned.

Q. And when they don't get orders, where do they usually stay? A. Wherever they are sent, I don't know.

Q. You don't know? A. No.

Q. Now, coming back to your orders to take the empty float out of the bridges, when the tug got up to these floats, what did you do? A. Put a line out.

Q. From where to where? A. From the tug to the float.

Q. And what does that line do, what is it for? A. That line is to push them up the river so I can get a 50
line across.

Q. A line across what? A. Across the two floats.

Q. You mean to secure them together? A. That is right.

Q. Now, the way these floats were lying in the bridges, was the bow or the forward end against the bridge apron? A. The stern is.

Q. You say it was the stern? A. No, the bow is up against the apron.

Q. That is what I asked. A. Yes, the bow is up against the apron.

Q. So when you got off the tug you were on the float? 51
A. Yes, on the stern.

Q. And which float did you mount, first, "58" or "53"? A. I think it was "53 float".

Q. And "53" you have already told us was in bridge 11? A. Right.

Q. That is where that photograph shows it, is that right? A. That is right.

Q. Now, when you got off the tug, what part of the tug did you come from? A. The bow.

Q. The deck of the bow? A. The bow.

Q. Where was the captain at that time? A. In the pilot house.

52 Q. And when you came off where was Johnson? A. He followed when I came off, he followed me.

Q. And where did you go? A. I went to get a line across on the stern, make them fast.

Q. You took a line— A. I went to make a line fast on the stern, in between the two floats.

Q. How far from the very end, in other words, how far from the very end of the aft end was that line made fast about? A. Three, four-foot.

Q. You make it fast on bitts? A. Make it fast on the boat.

Q. On what boat? A. On the tugboat.

53 Q. That was the line that was going to do what? A. That was the line that was going to push them together, the two floats.

Q. Did you do that? A. Yes.

Q. Did you see Johnson? A. I did.

Q. Where did you see him? A. After I came down off the boat.

Q. And where was he? A. He was walking down the float, down 11 bridge.

Q. On the same float that you had been on? A. The same float.

54 Q. That is "53"? A. That is right.

Q. And in what direction was he going? A. He was walking to the bow of the float.

Q. For what purpose? A. To let the lines go.

Q. And the lines he let go are what lines? A. Short rack lines.

Q. Now, you have used the word rack—may I see that exhibit?

(The exhibit was handed to Mr. Frank.)

Q. I show you Plaintiff's Exhibit 2. Now, will you point out what you mean by short rack? A. This is the short rack (indicating).

Mr. Frank: May that be marked by something? 55

The Court: Come over here and you point it out and I will put an R on.

The Witness: This is the line and here it is (indicating).

The Court: The line is on the side of the wall; is that right?

The Witness: That is right.

The Court: I will put a big R; that goes from one side of the line to the other. I will write the word across it, rack.

The Witness: Short rack. 56

The Court: Short rack.

Q. Where is the long rack? A. This is the long rack.

The Court: I have indicated that in ink.

Q. The line on which the letter R was put by his Honor, is that the line that he has to let go? A. That is right.

Q. That line is made fast to the float? A. Yes.

Q. What part of the float? A. On the bow of the float.

57

The Court: What part of the bow is it? Is there a bitt or a cleat?

The Witness: It would be a cleat or bitt.

The Court: A cleat or a bitt?

The Witness: Yes, either a cleat or a bitt.

The Court: And a bitt or a cleat is a piece of metal that is shaped so that lines can be wound around it and you tighten it?

The Witness: Make it fast, that is right.

The Court: It may be a small piece of metal, maybe at most six inches long?

The Witness: It could be longer than that.

58 Q. Both bitts and cleats are readily seen, are they not, on the starboard side or on the righthand side of Exhibit 1? A. You can see bitts and cleats.

Q. On both sides? A. I don't see no bitts, I just see cleats. I see a bitt up here (indicating).

Q. Will you show that to his Honor.

The Court: I know what they are. Does he have to get off the float to let go that short line?

The Witness: No, the only reason——

The Court: Just answer the question. In other words, he stands right on the float when he lets

59 loose that short line?

The Witness: That is right.

The Court: And when he lets loose that short line, is that float ready to be taken out? Is that the only line that holds it?

The Witness: There are two, one on each float, two lines.

The Court: He was on one float?

The Witness: That is right.

The Court: He lets the lines loose on both floats?

60 The Witness: He lets the lines loose on one float and then goes around and lets the other one go.

The Court: You mean he goes off, you mean he goes off?

The Witness: Yes, he goes off the float.

The Court: Which line did he leave loose first?

The Witness: The one on 11.

The Court: You saw him first go to 11?

The Witness: He was walking down 11 bridge.

The Court: Did you see him after that?

The Witness: That is all I saw.

The Court: You saw him going down to 11 and

his duty would be to take that line that I marked R; is that right? 61

The Witness: Yes.

The Court: That is on that other photograph. Then it would be his duty to go over to 12 and do the same thing?

The Witness: Go on the apron, walk around 12, and do the same thing.

The Court: But the last you saw him he was walking or doing something on 11, is that right?

The Witness: That is right.

Q. Mr. Gaglio, it isn't quite clear to me: Do I understand you told his Honor that the only line is on float "No. 53", there is only one line, and that is on the float that you saw him walking down on? A. On 11 bridge. 62

The Court: Walking down on 11 bridge.

Q. But the only line is at the bow, at the forward end, that was the one line at the rack; is that right? A. Let the line off the float on 11 bridge.

Q. Is there on the forward end or the bow end, is there any other line that is secured to either the long rack or the short rack or to the bridge itself? A. There is another line secured on the long rack. 63

Q. And is that line on the long rack, and we are talking about bridge 11 and not the other bridge, we haven't come to that yet, is that line on the long rack, is that secured to some part of the float "53" which was in bridge 11? A. I don't get you. Would you say that again?

Q. Bridge 11 is the only one we are talking about, we haven't come to the other one yet. Please bear that in mind, Mr. Gaglio. Now, this float "No. 53", that was in 11; is that right? A. Right.

Q. Now, outside of the line that he has to let go from

64 the short rack onto a bitt or cleat on the forward part, there is another line on the other side, on the starboard side? A. There is a line towards the stern of the float on the long rack.

Q. And who lets that one go? A. The bridge man.

Q. And when you say the bridge man, that means a man who was right on that long rack? A. Yes, there is a man there at that long rack.

Q. And were you at that line? A. No.

Q. Well, that line from the long rack which was at the stern, you were at the stern, were you not? A. I was.

65 Q. Now, that line from the long rack at the stern does that line go up on the bridge or is it thrown on the boat? A. It is thrown on the bridge.

Q. On the bridge? A. Yes.

Q. Who takes it off the bridge? A. The bridge man.

Q. How does he do that? A. Throws it off.

The Court: He unties it?

The Witness: It is not tied, it is just put on, he just puts it on.

The Court: What do you mean by that?

The Witness: It is attached to the long rack.

66 The Court: What is the purpose of that line?

The Witness: The line is to hold it there.

The Court: Well, it is tied to something on the bridge, isn't it?

The Witness: It is not tied, your Honor, it is just put, it is not tied, it is not made fast on the float but on the long rack.

The Court: What is tied to the long rack, this line is tied to it?

The Witness: To a bitt.

The Court: And he takes it off the bitt and throws it off the deck of the float?

The Witness: Yes.

Salvator Gaglio—for Plaintiff—By the Court.

The Court: And he hauls it up? 67
The Witness: He hauls it up.

Q. Do you mean by that, Mr. Gaglio, that the lines that are made fast to either of the apron or either one of the racks belong on the shore, they don't belong on the float; is that right? A. That is right.

Q. And in order for him from up there, from the long rack up there, in order for him to get this line off, what is there, is there a bitt around there or a loop on the line? A. It is just put on there, it is just put right around either on the bitt or the cleat.

Q. He just yanks it off? A. He can throw it off. 68

Q. Now, after those lines were taken off, did you go on the other float? A. No.

Q. You remained on this float? A. Float, on 11 bridge.

Q. The "53"? A. That is right.

Q. And that was at 11 bridge? A. That is right.

Q. And it was at the other bridge, bridge 12, that you had float "58"? A. That is right.

Q. And in the normal operation, the bow lines would have to be removed from "58"; is that right? A. That is right.

Q. In order to get from bridge 11 to bridge 12, how is that done? A. He walks across the apron, he has got to go on the apron and walk across. 69

Q. Walks across what? A. He goes on the apron and walks along the shore track. There is a step there and you walk across the apron from one apron to the other.

Q. And he then steps on the other float; is that right? A. Steps onto the apron of 12 bridge and then walks to the float.

Q. And then he has to take off the line from what, the long or the short rack? A. The short rack.

Q. Again the short rack, is that right? A. That is right.

70 Mr. Frank: Your Honor, I wonder if I can show the jury now the markings of the long rack and the short rack so they will be able to follow the testimony which I want to adduce now?

The Court: Yes.

(At this point the exhibits and the markings were shown to the jury.)

Q. I show you Plaintiff's Exhibit 1. What are these two metal objects that I point out in the foreground of the apron? A. Pins.

Q. Who releases those things before you move your
71 float? A. The bridgeman.

Q. And when the two floats are made fast to those bridges, are those pins engaged, are they locked in? A. We get orders, then the pins are all out.

Q. The pins are out? A. The float is cut out.

Q. You mean you will have to take the lines off that you have described? A. That is right.

Q. Now, the idea I assume of these pins is to keep this float as level as possible with the bridge apron; is that right? A. Well,——

Q. Do you understand my question? A. No, those pins
72 are put in there so they can load that float, so it doesn't wobble from one side to the other.

Q. And when you put your pins in there, there is the float deck and the bridge deck, and they are as level as you can get them; is that right? A. They are even.

Q. They are even? A. Yes, they are even.

Q. Tell me this: I want you to look at Plaintiff's Exhibit 2 and look at float "No. 58".

How high above the water line would you say the deck of that float is? A. Float to the water?

Q. That is right. A. About five-foot.

Q. So that when the float is secured against the apron,—this is called the apron, isn't it, the foreground? A. That is right.

Q. Then the bridge itself or the apron is also approxi- 73
mately five feet above the water; is that right? A. Yes.

Q. And, of course, that can be raised or lowered; is that right? A. Right.

Q. Depending upon the rise or the fall of the tide? A. No, no.

Q. What does it depend upon? A. It depends upon how the man handles it; she doesn't raise or lower with the tide.

Q. Let me see: If the tide is high, if you have high tide—do you know how high the tide gets at Oak Point, do you know? A. I don't know.

Q. Do you have any idea? A. Five-foot. 74

Q. Five or six feet; is that right? A. Yes.

Q. Well, if the float comes in empty and you tie her up against the bridge you have got to raise your apron to the height of the float; isn't that right? A. They have got a man to do that.

Q. I don't say you, nobody is saying it is you. All right, now!

I believe you told his Honor that the last time you saw Johnson was when he was walking towards the apron, No. 11? A. That is right.

Q. Did you see him again on the apron? A. No. 75

Q. Where was he with reference to the apron when you last saw him alive? A. He was about 40 feet away from me.

Q. And you were? A. I was walking towards the stern to put a line across the float.

Q. When you say you were walking towards the stern to put a line across the float, that was the line that had been handed to you by the second deckhand? A. No, no.

Q. That had already been made fast? A. That line is on the float.

Q. And then what did you mean, you mean you were walking towards the stern to put a line across, across

76 where? A. I have got to walk across the float to get a line across on the other float, to make it fast.

Q. And how far from the aft part, the extreme aft part of that float would you tie that line, or did you tie that line? A. I did tie it.

Q. I say how far aft, about? A. I don't get you.

Q. There are two floats, and you were on "53"; is that right? A. That is right.

Q. At one time or another you tied a line across from "53" to "58"? A. That is right.

Q. Did you succeed in doing that? A. I did.

Q. Did you do it yourself? A. I did.

77 Q. Did anybody help you? A. Nobody.

Q. That is what you are supposed to do? A. That is my job.

Q. I want to know how far in from the aft end did you tie those lines? A. The first pair of bitts, about, I would say, about 15-foot, 12-foot.

Q. All right. At one time or another was Johnson to put a line across at the forward bitts, too? A. That was his job.

Q. That is what he was supposed to do? A. Yes, supposed to do.

78 Q. After you completed the job of putting the lines across between "53" and "58"— A. Yes.

Q. Did you get a signal from the captain or did the captain give you a signal? A. I heard "all gone."

Q. I am not talking about that, Mr. Gaglio, I will come to that in a moment.

At the time when you had completed your operation of securing "53" to "58"— A. Yes.

Q. Do you signal the captain? A. I walked to the tug.

Q. You walked to the tug? A. Yes.

Q. The captain is in the pilot house and he has a clear view of you, I take it? A. Yes.

Q. And this was a clear day? A. A clear day.

Q. And it was daytime? A. Daytime. 79

Q. Now, when you get through with securing, where do you go? A. To the tug, I walk to the tug.

Q. And did you go over to the tug? A. I did.

Q. And there did you have to climb up, is there a distance— A. I don't climb up, I just stay by it, I stand by it.

Q. Stand by where, where do you stand? A. On the float by the tug.

Q. At that time when you secured your line across between "53" and "58" where was the tug? A. The tug was where I got off.

Q. Will you tell us where? A. From the first pair of 80 bitts on the stern.

Q. On the stern of "53"? A. "53", right.

Q. How close to you was the tug? A. Well, let me say——

Q. You must have a little patience with me, my friend. A. I have got patience. A foot.

Q. And then what happened after that? A. I listened to the captain's order, what he wanted me to do.

Q. What were his orders? A. Carry the line.

Q. What? A. Carry the line.

Q. Carry what line? A. The line that was made fast, 81 the line I had put on the float.

The Court: The two floats, you mean?

The Witness: No, the one float. There is a line off the tug to the float.

The Court: You first took a line and tied both floats, "53" and "58"?

The Witness: That is right.

The Court: Then he said carry the line?

The Witness: No, I got to stand by that line, your Honor, and I got to carry that line whichever way he wants me to carry it.

Salvator Gaglio—for Plaintiff—By the Court.

82 The Court: Which way did he want you to carry it?

The Witness: I think I carried in towards the bow.

The Court: Towards the bow?

The Witness: That is right.

The Court: You didn't go on the tug?

The Witness: I didn't go on the tug.

Q. You remained on the float? A. That is right.

Q. You remained on the float until you land? A. I am on the float all the time.

83 Q. And Johnson was on whatever float he was last on until— A. He has to get a line across on the bow.

Q. How, tell me this, at one time or another the tug got started; is that right, it started to pull? A. It must have, yes.

Q. You saw it? A. Sure I did.

Q. And you were at that time on "53"? A. That is right.

Q. Did you see Johnson? A. I did not.

Q. This short rack that you have indicated, what is the size of that short rack? In other words, what is the length of it, do you know? A. I would say about 60 feet.

84 Q. Wouldn't you say it is about 40 feet, about? A. I would say about 60, it could be smaller or it could be longer.

Q. That is good enough. Now, before you pulled out, did you signal to the captain that your lines were complete? A. He saw it.

Q. He could see it? A. Oh, yes.

Q. Because he was right there? A. That is right.

Q. How about Johnson, did you see where Johnson was? A. I cannot see Johnson.

Q. There was, you say, you heard something about— A. I said I cannot see him.

Q. I know you said that, but you heard some audible signal, did you not? A. I heard "all gone." 85

Q. Now, the words "all gone," was it Johnson said them? A. I don't know.

Q. You don't know? A. I don't know.

Q. You worked with him on that Transfer at least three months? A. That is right.

Q. Had you ever worked with him on any other Transfer? A. I did.

Q. You knew him quite well? A. I did.

Q. Now, when you pulled out of the rack or out of the apron, did the captain at any time say anything to you about Johnson? A. No; the time the captain told me was when he came out of the pin. 86

Q. Out of the pin? A. Out of the pin.

Q. I am afraid I don't understand. When you talk about out of the pin, do you mean out beyond the short rack? A. That is right.

Q. Because, my friend, you used the word pin, you use the word pin on these gadgets here. A. That pin has nothing to do with that pin, I am talking about the pin on the short rack.

Q. The pin is the short rack? A. That is right.

87

Mr. Peet: Your Honor, I think this is all hearsay, I don't think it is proper.

The Court: I will take it. Go ahead.

Q. What did the captain say to you? A. Where is Johnson.

Q. Now, when you said that you came out of the pin or the short rack, what did you mean by that? A. I mean when you pull the float out, it is beyond the pin.

Q. I see. So that at that time when he said to you where is Johnson, float "53" that you were on had pulled

88 beyond the pin; is that right? A. They both pulled beyond the pin.

Q. Both of them? A. That is right.

Q. What did you say to him when he said where is Johnson? A. What could I say? How do I know, how would I know?

Q. My friend, there is nothing laughable about this. What did you say? A. What could I say, I don't know.

Q. You don't know? A. I don't know.

Q. Was the line at the bow that leads across, was that made fast? A. No, it cannot be made fast.

Q. It has to be made fast by Johnson, isn't that right?
89 A. That is right.

Q. But you say it wasn't? A. It can't be made fast.

Q. But you make it fast when you get it clear? A. You have got to come out of the pin to make it fast.

Q. Who made it fast that time? A. We didn't see Johnson, I had the order of the captain to get a line across.

Q. So that you took care of what Johnson was supposed to do? A. I did.

Q. And in order to do that, you walked down to the forward end or to the bow part of "58" or "53", which was
90 it? A. "53".

Q. And you threw a line across? A. I got a line across.

Q. Now, then, you started ahead. I mean the tug, not you, I am talking about the entire operation. The tug and the float started ahead? A. Started to move.

Q. Now, tell me this: As the tug started ou. of the slip or out of the apron or bridge, whatever you want to call it, was there a whistle blown? A. There has got to be a whistle blown.

Q. That is the slip whistle; is that right? A. That is right, slip whistle.

Q. That whistle notifies traffic on the river that you 91
are coming out of a slip? A. Notifies everybody.
Q. Everybody around there? A. That is right.
Q. And is that a good loud whistle? A. Very loud.
Q. How is that blown? A. The captain blows it.
Q. I know that, but how many whistles? A. One.
Q. One long one or a few? A. One long one.
Q. At that time, was the tug backing up or going forward?

Mr. Peet: I object to the form of that question, your Honor.
The Court: I will take it. 92

Q. Go ahead and answer.

The Court: At the time of the whistle, were you going forward or backward?
The Witness: Going backward.

Q. At the time when the whistle was blown, this long loud whistle, how were you secured to the tug, how was your float, not you, the float secured to the tug? A. Had a line on it. We had that line I was talking about, I had put it out. 93
Q. That is the line that you took from the tug that was handed you by the second deckhand; is that right? A. Right.
Q. And was that line made fast on the tug? A. That is right.
Q. And what part of the tug was it made fast to? On the bow?
Q. And you had made it fast and you were on the "53"? A. I didn't have to make it fast, just put it there, it isn't fast.
Q. It isn't fast? A. The line is not fast. What I mean by fast, I tried to make that clear——

94 Q. You are not getting it clear to me, I am sorry, it is my fault. Go ahead and explain. A. I call a line fast if I make it fast, I put turns on it. This line has no turns on it, it is just put there, I laid it there.

The Court: It just slips on?

The Witness: There is an eye on the line, and that is just put on the bitt or on the cleat and that fastens it.

The Court: And that fastens it?

The Witness: Yes, that fastens it.

The Court: You don't tie it around?

95 The Witness: No.

The Court: When you tie a line you mean you are looping it?

The Witness: When I make it fast.

The Court: This is a line that fits over something, that connects and holds?

The Witness: That is right.

Q. It holds it just as much as if you had fastened it; is that right? A. That is right.

Q. For how much of a distance did the tug continue to back out, about? A. I don't know.

96 Q. About. Give us some idea. A. I don't know, that is not my operation, I don't know. That is the captain's. I don't know how far he wants to go, that is his business, I don't know.

Q. Did he clear the long rack? A. No. You referring to what?

Q. In other words, how long did he continue to back out, that is what I want to know?

The Court: Well, you have got to set a beginning. I think there is a little confusion here. How was the tugboat tied to this float?

The Witness: It was a long line, I know. 97

The Court: Was it to the bow end or the stern?

The Witness: The bow was up against it.

The Court: So, in other words, for him to get these two floats out he would have to back out?

The Witness: He would have to back out.

The Court: He was going out of the pier, so to speak.

The Witness: Out of the slip.

The Court: But the back of it, the back of it because the bow was up against——

The Witness: The bow was coming out.

The Court: What was attached to where you 98 were, the stern or the bow of the tug?

The Witness: The bow.

The Court: Of the tug?

The Witness: There is a line off the bow of the tug onto the float

The Court: I am asking you a very simple question: Was your float the place where you connected, did you connect it with the stern of the tug or the bow of the tug? That is a very simple question.

The Witness: The bow. 99

The Court: Then the stern was out in the river?

The Witness: Of the tug?

The Court: Yes.

The Witness: It has got to be.

The Court: You may have connected it up at the bow—well, let us illustrate it with these models. Here are the two floats (indicating with models). The heavier is your tugboat?

The Witness: Yes.

The Court: Now, what part of the tug was the closest to the float that you were on, the stern or the bow?

100 The Witness: The bow.

The Court: Then in order to back out, to go out of the slip——

The Witness: Can I set that?

The Court: Come over and show me what you mean.

(At this point the witness took the models and continued as follows:)

The Witness: Here are the two floats (indicating), here is the boat (indicating). The boat is secured over here (indicating).

The Court: It is catti-corner.

101 The Witness: It was secured the way it is now.

The Court: What part of the boat is that (indicating)?

The Witness: That is the bow.

The Court: The bow?

The Witness: Yes, the bow.

The Court: And this is the stern (indicating)?

The Witness: That is right.

The Court: How did he intend to pull them out?

The Witness: He pulled them out with a line.

The Court: Like that (indicating)?

102 The Witness: Yes.

The Court: What do you do after you do that?

The Witness: That is in order to catch a line, when we split the short pin.

The Court: Then you connect, then you have got them fast, so first you fasten up here like that (indicating) and then you fasten them both on the bow?

The Witness: It is over here, on the side.

The Court: Does he stay here all the time?

The Witness: The operation is this way: He is pulling them all the way and when he gets out

into the river he pushes it up to the Church E. Gates pier, which is up this way (indicating). 103

The Court: I see. Now, what I want to know is this: He blows his whistle indicating he was going out of that slip; is that right?

The Witness: That is right.

The Court: And he said to you where is Johnson?

The Witness: After he split the pin.

The Court: After he was beyond?

The Witness: Yes.

The Court: And he told you to go back and put a line there and you did? 104

The Witness: I did.

The Court: All right, I think we have got it now.

By Mr. Frank:

Q. Just one more thing——

Mr. Frank: I wonder if your Honor will loan me those.

The Court: Yes, you may have them. 105

Q. Mr. Gaglio, will you come down here——

The Court: I think you had better show that entire operation to the jury.

Q. Mr. Gaglio, see this is now the front part of the tug because it is hard—(indicating).

Now, at first he pulls out of the slip with the bow against this "53"; is that right? A. That is right.

Q. And he continues pulling out until—this is still split, is that right? A. It has got to be split.

Q. And then before you put the line on, that was the

106 time he asked you where is Johnson? A. He asked me where Johnson was when he split the pin.

Q. Because somebody is supposed to put that line on? A. There was nobody there.

Q. So you went and did it? A. He told me to get a line out on the bow.

Q. He is the man that is in charge of the operation, I am talking about the captain. A. That is the boss.

Q. That is the boss of the entire thing? A. That is right.

Q. And then after you got out of the slip, he then turned around, is that right, so that he goes with the forward
107 part—you tell me. A. He has got to come out, that would be the operation.

Q. We are trying to find out. You tell us about it. A. I am trying to tell you.

Q. So he then turns around— A. That is only in my imagination, it is what the captain wants to do.

The Court: Now, no argument.

The Witness: I don't know these things, your Honor.

The Court: Wait a minute, please.

108 Mr. Peet: Your Honor, the fundamental trouble is that they are trying to qualify a witness who is not a captain.

The Court: Let us not have any argument.

You are just a witness here.

Now, the witness explained this very accurately.

You came out, your tugboat is that way and you tie it here (indicating) and you start to bring the three boats out like that (indicating); isn't that the way it is done?

The Witness: No, it is like this, your Honor. Let me explain to you, your Honor.

The Court: Explain it so that the jury may hear.

The Witness: He has a line, and this is the operation of the line here (indicating). Here are the two floats. I secured a line on the stern. 109

The Court: On the stern?

The Witness: I got a line secured between them. Then, when he gets orders, he blows the ship's whistle and backs out.

The Court: And as they come out, they come out that way (indicating)?

The Witness: They would, naturally; the bows would come together.

The Court: That is the way they do it so as to get past the docks or the pins, as you call them? 110

The Witness: One pin.

I will show you what I mean.

This is a pin here (indicating), it is past there and he has to secure them.

The Court: Past this short rack which is marked on this exhibit?

The Witness: Yes, that is the pin.

The Court: I have got it marked short rack.

Then it was Johnson's duty to put a line to secure them at the bow, and when they are tied together forward and backwards they are this way (indicating)? 111

The Witness: That is right.

The Court: That is what you went back and did in place of Johnson?

The Witness: That is right.

The Court: If Johnson had been there he would have done it?

The Witness: Yes.

The Court: You did it up front and then you had to do it on the back?

The Witness: On the bow because Johnson wasn't there.

112 By Mr. Frank:

Q. All right, now we can go back. While you were on the "53", did you see any oil on "53"? A. I did.

The Court: Weren't you on "53"?

The Witness: The "53" float, that is right.

The Court: Are you now going to claim oil as negligence?

Oh, no. You haven't it in your pleadings.

Mr. Frank: Doesn't it say?

The Court: Now, Mr. Frank, let us get this
113 straight. Your opening left much to be desired, I could have made you open again. You didn't tell this jury one item of negligence in your opening. I told you that in chambers that you were very faulty. You have a very general complaint here, a very general complaint, and nowhere do I see in the complaint that you claim the accident happened because of oil.

Now, I cannot allow you after five years to make an amendment at this late date to cover that.

Mr. Frank: Will your Honor permit me to read
114 my complaint and see whether or not there is enough on it.

The Court: I am not going to allow you to include it under the general item of negligence, I am not going to let you do that. You hadn't opened up and told the jury what negligence was due to.

Mr. Frank: All right.

The Court: Show me where you are entitled to do it, show me what paragraph and what words.

Mr. Frank: I am trying to find them, your Honor.

The Court: "Failed to furnish him with a safe and secure place in which to work"? That is an

allegation, and if under that allegation you claim oil comes in, I will rule against you. I won't allow you any proof of oil under that allegation at this late date in view of your own opening and in view of the fact that five years have elapsed and in view of the fact that the complaint is very general. 115

If you wanted to claim oil I think it was your duty to claim it specifically in your complaint. Under that particular allegation, you could prove any item of negligence that happened to come up and which might be all right, but I think that there has to be some bar to the door somewhere. 116

Mr. Frank: Your Honor, will you give me a moment?

The Court: Mr. Frank, had you opened up to the jury and said that, I might even have allowed you to continue on that line.

I will tell you what I will do, I will let you amend your complaint, let you move to amend your complaint, if you want to, and then I will give you permission to amend your complaint. But, at this stage I think that you can only do it if we withdraw this jury. You can then go back and amend your complaint so that the defendant can properly be advised as to what the allegations of the complaint are, then you can come back to trial a month later. You will only lose one month and you have had five years. 117

Mr. Frank: Yes, but that little month will make a big difference.

The Court: It doesn't make any difference to me.

Mr. Frank: Will your Honor simply give me an exception.

The Court: All right.

118 Mr. Frank: Will your Honor indulge me a moment?

The Court: Yes, surely, take your time.

Do you want a five-minute recess to get yourself orientated?

Mr. Frank: It wouldn't be a bad idea, I can always use a recess.

(At this point a five-minute recess was taken.)

By Mr. Frank:

119 Q. Now, after you secured the bow part that was supposed to have been done by Johnson, you proceeded, I mean the tug and the float proceeded over to Gates' pier? A. Church E. Gates, that is right.

Q. And you say that was about five blocks away? A. About five blocks.

Q. And at that time were the two floats on the port or on the starboard side of the tug? A. Port side.

Q. So that float "53" was closest to the tug? A. That is right.

Q. And "58" was alongside of it? A. That is right.

Q. And what did you do over at Gates' pier? A. Tied the floats up.

120 Q. How long did that take? A. About 25 minutes.

Q. How long did it take you to get out of the slip, or as you call it, beyond the short rack, until you reached Gates' pier, about? A. I figure the whole operation is about 25 minutes.

Q. Entirely? A. Yes.

Q. What did you do after that? A. Came back.

Q. For what? A. Came back to the hole.

The Court: The tugboat?

The Witness: The tugboat came back to the hole.

The Court: The tugboat itself. 121
The Witness: It came back light.

Q. To the hole? A. That is right.
Q. And how far from bridge 12 is the hole would you say? A. I think I told you that before.
Q. Tell it to me again, please? A. About 600 feet.
Q. 600 feet? A. Yes.
Q. What did you do there, what did you go there for? A. The captain blew for Johnson.
Q. At the hole? A. He blew long before he got to the hole.
Q. But Johnson wasn't there? A. Didn't see nobody. 122
Q. What did you do then? A. Then the captain gave me orders to see if I could see him.
Q. You mean you got off the tug at the hole? A. That is right.
Q. And you walked over to where? A. I walked up to the office.
Q. Where is the office? A. The office is right between the 5th bridge and 10th bridge.
Q. Where is it? A. It is right in between the 5th and 10th bridge.
Q. How long did it take you to do that? A. Three 123 minutes.
Q. What did you do over there? A. I asked if anybody had seen Johnson, if Johnson was up there.
Q. Whom did you ask? A. The bridgemaster.
Q. Was he the only man there? A. The only man I saw.
Q. When you went releasing your lines, I am coming back to the original operation, did you see any bridgeman at that time? A. Releasing what lines?
Q. When you were releasing your line and when Johnson was releasing his line, did you see any bridgeman? A. I don't get what you mean.

124 The Court: At the beginning of your operation when you were getting these floats out, at any time during the operation while you were handling lines and while Johnson was walking back to handle his lines, did you see any bridgeman there at that time?

The Witness: I didn't take notice, I don't remember, I don't think I did.

The Court: You don't remember whether you saw any bridgemen at any time?

The Witness: I didn't see any bridgeman.

The Court: You didn't see any bridgeman?

125 The Witness: No, I wasn't walking that way.

The Court: These floats are how long?

The Witness: Floats are about 340 feet long.

The Court: And if a bridgeman was on the bridge he would be about 300 feet away?

The Witness: Not on the long rack.

The Court: On the long rack, how far would he be?

The Witness: Say about 70 feet.

The Court: And on the short rack?

The Witness: He would be 300 feet.

126 The Court: Well, the fact is you don't remember seeing any bridgeman at any time, is that your testimony?

The Witness: I didn't see no bridgeman on that operation, your Honor, while we were taking these floats out.

Mr. Frank: That is what we were talking about, Mr. Gaglio.

The Witness: All right.

Q. Now, then, you spoke to the master bridgeman who is in a tower of some kind? A. Up in the office.

Q. In an office? A. Yes.

Q. And when he told you he didn't see Johnson, what did you do next? A. I went downstairs and looked around. 127

Q. Where did you look? A. I looked in the back room, maybe he might be there.

Q. Of the office? A. Downstairs, in the back room.

Q. You see, I don't know these things, you must tell me. A. The office is upstairs, and I came down and I looked underneath, what we call the back room, it is under the office.

Q. Was there anybody in there at that time? A. Nobody.

Q. Nobody at all? A. Nobody. 128

Q. Then what did you do? A. I went to the shanty that is behind the office; there is a shanty there.

Q. You looked there? A. There was nobody there.

The Court: What is the shanty for?

The Witness: The shanty, they keep lines and all kinds of gear for the floats and bridges.

Q. It is for the bridgeman? A. No, it is not for the bridgeman, they secure lines there, they have lines there in case they need to have float lines or bridge lines, then they take a line from the shanty to put on the float.

Q. Was there anybody in there? A. Nobody.

Q. At that time, was it light or getting dark? A. It was light.

Q. Still light? A. Getting dark.

The Court: What time of the night was it?

The Witness: I figure 6:30.

Q. It was at 6:30 that you visited the bridgemaster? A. About 6:30, quarter to 7.

Q. You are not sure about that? A. I am not sure, no.

130 Q. Now, tell me when you didn't find him in the shanty, what did you do next? A. I told the captain, I went back to the captain and I told him that I don't see him.

Q. Then what did you do? A. He told me to look around, he said look around the bridges.

Q. Up to the time that the captain said look around the bridges, had you gone to the bridges at all? A. No.

Q. To either one of them? A. No.

Q. The first suggestion you got about looking at the bridges was from the captain? A. No, that was after I came back. I looked for him the first time and——

131 Q. You told us that? A. Yes.

Q. Then he said look around the bridges, and what bridges did you go to? A. I walked right across all the bridges, from 10 to all the way over to 12.

Q. And in order to get from 11 to 12, how did you walk? A. You don't walk across the bridges, they have got steps there; you walk across, you can walk across——

Q. Did you have to go up on a rack or don't you have to go up on a rack? A. You don't go on racks at all, you walk on the bridges.

Q. From one to the other? A. That is right.

Q And did you find Johnson? A. I met one bridgeman,

132 and I asked him, this was on my way to the bridges, and I asked him if he had seen Johnson; he said no.

Q. Then what did you do? A. I continued walking.

Q. Come on, tell us the balance. A. With that I saw something in the water.

Q. At what bridge? A. 12 bridge.

Q. And at 12 bridge that was where float "No. 58" had been secured before you pulled her out? A. Right.

Q. Is that right? A. Yes.

Q. Then what did you do? A. Well, I went back to the captain and told him what I had seen.

Q. What did you say? A. I said I saw something in the water, I didn't know what it is.

Q. What was it? A. I didn't know, I didn't know 133
until I got it up. He said get a boat hook and line. He came with me, we both went back, the captain and me, and when we lowered the apron down and pulled it down, we turned it around and it was Johnson.

Q. How close to the bridge apron was he? A. About three-foot.

Q. Is that something that you had seen before you went over to the captain? A. I had seen myself, yes.

Q. When you pulled him up, was he alive or dead, so far as you know? A. He didn't speak to me.

Q. Did you try to do anything? A. I worked on him. 134

Q. What do you mean by that? A. I tried to give him respiration.

Q. Nothing happened? A. No response.

Q. What happened after that? Did you go back to the boat or did something else happen? A. After that I don't know what happened; then the captain was there, I don't remember. All I know is that the cops came down and they had taken him away, that is all I know.

Q. When a bridgeman, in the operation of letting off the two floats, when they throw off a line, is it normal practice for him to holler "all gone", "all clear"? A. Just "all gone." 135

Q. "All gone", those are the words they use? A. That is right.

Mr. Frank: I think that is all.

Cross examination by Mr. Peet:

Q. Now, Mr. Gaglio——.

The Court: You had better come up closer, you are too far away, I can't see you back there.

Q. When a bridgeman hollers "all gone," does he

136 designate "all gone port" or "all gone starboard"? A. Oh, yes, yes, he hollers out "all gone on the port," that is all. He designates the port or the starboard. The captain can hear that, the captain has to hear that.

Q. This man Johnson, you have known him for some time? A. I did.

Q. Was he able to swim? A. Oh, yes.

Q. Was he a good swimmer? A. Yes.

Q. Was he a qualified man in his job? A. He was.

Q. Working right along and doing it properly? A. Right.

137 Q. At any time while the carfloats, "53" and "58", were being pulled out of that slip, did you hear any call for help? A. At no time at all.

Q. Did you hear any call of any kind? A. No.

Q. Did you hear any splash in the water? A. No.

Q. Did you see anything unusual happen? A. No.

Q. Now, before the captain starts to pull the carfloats out and after he has received the "all gone" signal to designate that all the lines are clear, does he then start sounding the slip whistle? A. He blows the slip whistle first when he hears the "all gone."

Q. He does that before he actually starts moving the 138 tug? A. Before he moves the boat, that is right.

Q. Now, when you were working over Johnson, after he was removed from the water and you were trying to give him artificial respiration, did you get any water out of his lungs? A. The only thing I saw was just bubbles coming out of his mouth.

Q. No water? A. I didn't see no water, just bubbles.

Q. Did you see any cuts or bruises or marks on his body? A. I was told to look for them.

Q. Did you see any? A. I didn't see nothing, no.

Q. Now, you said that the second deckhand on this day was a man named Santalesa? A. That is right.

Q. Is he now— A. Deceased.

Q. He is dead? A. That is right.

Mr. Peet: That is all. 139
Mr. Frank: That is all.
The Court: All right, step down.
Mr. Frank: May I proceed, sir?
The Court: Yes, get a little preliminary in.
Mr. Frank: Captain, will you come here?

JOHN J. O'BRIEN, called as a witness on behalf of the Plaintiff, having been first duly sworn, testified as follows:

140

Direct examination by Mr. Frank:

Q. You were the captain of this "Transfer No. 10"? A. Yes.

Q. And, Captain, on the day of this accident, April 22, 1946, how long had Johnson worked with you? A. I don't know exactly, but it had been several months, I would say.

Q. Had you ever worked with him on any other job? A. Yes, I had.

Q. You knew him quite well? A. I did.

141

Q. He was there, as we will show later, he was employed at that time some nine years for the railroad company, is that about your recollection? A. Somewhere about that.

Q. Now, do you remember who brought you the orders, who actually delivered the orders to you to go over to Oak Point? A. To go over there?

Q. Yes, to proceed to Oak Point. You get written orders, don't you? A. Well, at that time, no. There was a shore floatman, and he would just give us the orders verbally.

Q. Now, Captain, I want to ask you this: I am going

142 back now to the time you started out from Pier 39 to bring a float to bridge 5, wasn't it? A. Yes, it was.

Q. And Johnson was one of your crew? A. That is right.

Q. And the operation there required leaving this float at this bridge 5; is that right? A. That is right.

Q. Now, what part of the operation did Johnson take part in on that operation, what did he have to do? A. You mean what did he have to do then?

Q. What did he have to do and what did he do? A. He checks the chains and chocks of the cars on the float; he
143 sounds it to see if there is too much water in it, if it is seaworthy, and he takes a record of the cars and the seal numbers.

Q. Is that all done before you get under way? A. Mostly it is in cases like that.

Q. And then when you landed that car at pier—from pier 39, what part of the operation did Johnson take part in? A. He goes out on the float and he takes the bridge lines from the bridgemen, puts them on the float and he takes the rack line from the bridgeman if it is necessary.

Q. And did he do that on that occasion? A. And also he delivers his records and his waybills of the cars to the
144 bridge office in Oak Point.

Q. And then you wait until—well, let me put it this way: After having done all of that and securing that float to the bridge, you leave with your tug; is that right? A. You release the tug from the floats.

Q. Before they secure the float to the bridge? A. Yes.

Q. And who does that, Johnson? A. The two deckhands. Well, in that particular operation Johnson is up in the office with his waybills and records.

Q. And in the office you mean on shore? A. That is true.

Q. I see. And then you wait for him to come back? A. In the meantime while he is up there, this only takes

a small amount of time, the deckhands release the boat and the boat moves a space of maybe 60 or 70 feet from that place into this hole. It is a very short distance. It ties up there and gets water, if necessary, and waits for Johnson to return. 145

Q. You are going a little ahead of me. I want to ask you this: At the time when you left bridge 5 you made sure that your crew was aboard; is that right? A. Yes, that is true.

Q. You made sure that Johnson was aboard? A. Yes.

Q. You saw him aboard? A. Yes.

Q. And then you continued along over to the hole, what is that called—— 146

The Court: Let me ask you this: What you mean is that while Johnson was in the office with the records you released that carfloat at bridge 5 and went into the hole and then picked up Johnson, up at the hole, you waited at the hole for Johnson?

The Witness: That is right.

Q. And that hole is right close by to where the office is? A. That is right.

Q. And you waited for him to get on? A. Yes, I did. 147

Q. And then you proceeded where? A. Well, there was a short lapse of time. We either got water or waited for orders. Then we proceeded from the hole to 11 bridge in order to move these floats out of 11 and 12.

The Court: Let's see, basically your operation was that you were going to move these floats from 11 and 12 out and go where with them?

The Witness: Pier 3, Church E. Gates.

The Court: How far away is that?

The Witness: Two, three hundred feet.

The Court: Now, in order to do that operation,

148 Johnson would take one float and this last witness would take another float; is that right?

The Witness: That is right, your Honor.

The Court: And your idea was to get the two floats out, put them together, and take them over to wherever you said to be loaded?

The Witness: Not to be loaded, but to be tied up.

The Court: Now, you were absolute boss of this operation, weren't you?

The Witness: That is right.

The Court: In other words, Johnson and this last witness and the mate who we now know is
149 dead, were all under your supervision and direction; is that right?

The Witness: That is right.

The Court: The job had to be done whichever way you told them to do it; is that right?

The Witness: That is right.

The Court: The responsibility was entirely yours; is that right?

The Witness: That is right.

The Court: We will start from there tomorrow morning at 10:30.

150 (Adjourned to Wednesday, April 11, 1951, at 10:30 a. m.)

Brooklyn, New York,
April 11, 1951. 151

Appearances:

(As heretofore noted.)

TRIAL RESUMED

JOHN J. O'BRIEN, resumed:

Direct examination (continued) by Mr. Frank:

Q. You remember the questions that the Court asked you as we adjourned, don't you? A. Yes. 152

Q. In other words, you were fully responsible for the job there? A. That is correct.

Q. And you supervised it? A. Yes, that is right.

Q. It is up to you to see before you pull out with your tug that your men are on the tug, is that right?

The Court: Well, I don't think that is a proper question. That is not what I asked him. I think you have to go into it a little deeper.

By the Court: 153

Q. You were fully responsible for the movements made there? A. Yes.

Q. And you were in charge of those movements? A. Yes.

Q. And these men were working under your orders and direction, weren't they? A. That is correct, your Honor.

Q. Including the men that were on the floats? A. That is correct.

Q. And including the man that was subsequently found dead in the water, is that correct? A. Yes.

The Court: Now, you can pick it up from there.

154 By Mr. Frank:

Q. Captain, as I understand it, the line that Johnson was to remove on the "58", that was against which rack, the short rack or the long rack? A. The short rack.

Q. And the one that he handles is the one on the bow, that is, on the port bow, is that right? A. That is correct.

Q. Now, from your experience over the years you know that at a certain time Johnson would be at that particular line, is that right? A. That is right.

Q. Through your many operations, you know that, is that correct, sir? A. Yes, that is correct.

155 Q. In other words, after he got through on the "53", did you see him walk over to "58"? A. No, I didn't.

Q. Your pilot house is how high above the deck of your tug? A. Oh, approximately ten feet.

Q. Now, as to your pilot house what would you say was the height of your pilot house above the carfloat? I am talking about the deck of the carfloat. A. Well, the floor would be about ten feet above the deck of the carfloat.

Q. The floor of your pilot house? A. Yes, the floor of my pilot house.

Q. About how tall a man are you? A. I am close to six feet tall.

156 Q. And this pilot house is entirely glass enclosed, is that right? A. That is correct.

Q. Do you keep your windows open? A. I keep one or two windows open on the side on which I am working, as a rule.

Q. What is that for? A. So that I can see and hear what is going on.

Q. Why is it important to see and to hear what is going on?

Mr. Peet: I object, your Honor.

The Court: Sustained.

Q. It is important to see, is it? 157

Mr. Peet: I object to that, your Honor.
The Court: Yes, objection is sustained.
Mr. Frank: I respectfully except.

Q. To hear what? A. Shall I answer that question?

The Court: Yes.

By the Court:

Q. Why did you keep the windows open, to see what? 158
A. To hear the signals from the deckhands when my tow was ready to be moved.

By Mr. Frank:

Q. Was there any reason for that except the reason that you should hear that? A. So that I will know when to proceed about my work.

Q. If you move it while men are handling lines, is that something that should not be done?

Mr. Peet: I object to that question. 159
The Court: Sustained.

Q. Is there any danger involved in moving while the men are handling lines? A. Yes.

Mr. Peet: I object to that.
The Court: Sustained; strike it out.
Mr. Frank: I respectfully except.

Q. Is there any purpose in hearing these signals before you start?

160 Mr. Peet: You have already gone into that.

The Court: Well, let him answer the question.

A. Do you mean before I start my maneuver, or before I start my tow?

Q. When you move out. A. When you move out, the purpose of having the window open, it is for one thing, to see more clearly and to hear any signal that is in order.

Q. What is the purpose of hearing the signal? A. So that I know that it is time to proceed.

Q. And if you move before you hear the signal——

161 Mr. Peet: I object to that.

The Court: Wait a minute. Go slow on this. That is sustained.

Mr. Frank: I respectfully except.

Q. Now, the line that Johnson has to take off, that is one from the short rack. Now, has that got a bight in it, or what do you call it? A. It has turns. It is made fast right over a cleat, or a pair of bitts.

Q. Now, in moving before you get the "all gone" signal, is there a particular purpose involved so far as the man who is taking off the line is involved?

162 The Court: Read that.

Mr. Peet: I object to the form of that.

The Court: Yes; I don't quite understand that. I think you ought to make it clear. I think I know what you are trying to say, but it is a little top-heavy.

Mr. Frank: Yes, I think you are right, that is why it is a little, a bit topheavy.

The Court: There should be no argument. If you get yourself into trouble I will tell you how I think you ought to do it.

Q. While a man is handling the line there, is there a danger involved if you move before you get the "all gone" signal from the man? A. Am I permitted to answer that? 163

The Court: Well, your attorney has not objected to it.

Mr. Peet: I think it is argumentative, if your Honor please.

The Witness: Can I explain it more fully than just saying yes or no?

Mr. Peet: I think the question is argumentative. I make an objection.

The Court: I sustain it. It is argumentative. It is obviously argumentative. You have got to admit that, Mr. Frank. I will allow you great latitude. You have got to start out with what the system was, and then go into these things, do you see? I will give you plenty of latitude. I know he is the defendant's witness, and I won't hold you to any time limit, but I think you have got to get the foundation first, and then ask those questions. 164

Mr. Frank: I except, your Honor. I want to adopt your suggestions, but that is not "accept."

Q. Now, tell me this: Before you start out of the slip, what is the custom as to how you learn that you can start or that everything is clear for you to start? A. Before I start to back out of the slip, I make sure that all lines are cast off. 165

Q. And how do you make sure? A. By either seeing it with my own eyes or being told it by means of the signal "all gone."

Q. And where you can't actually see the operation, do you rely upon your hearing? A. I do.

Q. And in this case, did you get a signal from Johnson? A. I could not be sure whether it was Johnson.

166 Q. You didn't recognize Johnson's voice? A. I didn't.

Q. Now, tell me this: You say that the custom is to wait until you get "all gone" or "all clear" signals before you start out of the slip, is that right? A. That is right.

Q. Now, why is that important to wait for the "all gone" signal?

Mr. Peet: I object to that question.
The Court: Yes, that is argumentative.
Mr. Frank: I respectfully except.

167 Q. Now, tell me this: Is there any danger involved in pulling out—I am talking about danger to the man—involved in pulling out before you get the signal from the man who is handling the line?

Mr. Peet: I object to that question.
The Court: Sustained.
Mr. Frank: I respectfully except.

Q. Now, will you be good enough to look at Plaintiff's Exhibit 1 (handing paper). Is that about the position of your tug against the "53" at the beginning of the operation, would you say? A. Yes.

168 Q. And at that time what would you be doing or attempting to do? Would it be to push the two sterns of the two floats together? Am I right? A. Yes.

Q. Now, let me see that again, please (taking exhibit). Now, where the man is in the pilot house, do you know who that is? When the picture was taken, was that you or someone else? A. No, I wasn't there.

Q. But you can see the captain in the pilot house right there in that picture, can't you? A. Yes.

Q. Now, after Gaglio put on his line across tying up "53" and "58"—you have that in mind, have you not? A. That is right.

Q. And you know that the lines are clear and you then 169
give a whistle, is that the idea? A. That is right.

Q. That is the slip whistle? A. Yes.

Q. That notifies traffic on the river that you are coming out of the slip? A. That is right.

Q. Is that a long loud whistle? A. Yes, it is a long loud blast.

Q. Now, Captain, will you be good enough to look at Exhibit 2 (handing paper)? Now, what is indicated on Exhibit 2, is what part of the operation, would you say? A. That would be pushing the floats out of the slip.

Q. And at that time, you, and what I mean by "you" is 170
your tug, have its bow in here, its bow into the slip? A. Well, you see, this picture is not an actual picture of my operation. This picture was taken at some other time. Now, this picture wouldn't be the way I did that job.

Q. Well, you were starting to back out, is that right? A. That is right.

Q. And as you were backing out, you would have the "53" nearest to you, is that right? A. That is correct.

Q. Now, as you are backing out, of course, your bow is in towards the bridge, in the direction of the bridge, may I call it? A. That is true.

Q. In the case that you see there on this photograph No. 171
2, is the bow in towards the bridge? A. No, not in this photograph.

Q. That is not the way you did it? A. No.

Q. That is perfectly all right. Now, just let me ask you this: As you are looking at photograph No. 2, this one, how far from the short rack is the end, or the forward end, of the "58" on this photograph, about? A. Oh, maybe 15 feet; the perspective you can't tell.

Q. You can't tell? A. No, but I would say about ten or fifteen feet.

Q. Yes. At that time you have a full view of the "58", is that right? A. That is true.

172 Q. Once it clears the short rack, you see it all? A. Yes, then I see the full expanse of the "58".

Q. Then you see the full expanse of the "58"? A. Yes.

Q. Now, the rack itself, the short rack itself, is about how long, would you say? A. Well, I would say 40 or 50 feet, 50 maybe.

Q. Now, Captain, I want you to refresh your recollection from this letter from the Department of Commerce on the condition of the tides and see whether that will help you to refresh your recollection as to the state of the tide? A. Yes. I have read this letter.

173 Q. Now, does that help you in giving the stage of the tide at that time? A. Yes, it does.

Mr. Peet: At what time?

Q. Does it?

Mr. Peet: At what time?

Mr. Frank: At the time when he got over.

Q. At the time when you got over, when I say the time, you understand that I mean at the time you got over to bridges 11 and 12 for that operation, do you? A. Yes.

174 Q. And how high was the tide at that time, about? A. Well, it was starting to get slack. I would say it had fallen about halfway.

Q. How high does it rise altogether? A. There is a difference of about four or five feet.

Q. Is that all? A. Yes.

Q. At 6 p. m. the tide was four feet five inches, and at 6:45 p. m. it was three feet four inches; is that about right? A. That is about right. They are only computing it.

Q. It was ebb at that time? A. It was definitely ebb tide at that time.

Q. Now, the bridge and the rack. The rack, of course, 175
is built solidly, and it doesn't go up or down with the tide, does it? A. No.

Q. It would not go up or down? Does it? A. No, it wouldn't.

Q. That depends. They could move it by motive power, by the winch, is that right? A. That is right.

Q. Now, from your experience over there at Oak Point, and you have been there a good many times, haven't you, at Oak Point? A. Yes, sir.

Q. Would you say that photograph 2 shows a low tide at that time? Is that a waterline you see on the long 176
rack? A. That is correct. Well, as I said, the tide would be almost low, between halfway out and low.

Q. And on this picture? A. Yes, that is right, but the tide does vary.

Q. Yes, I know.

Mr. Frank: Now, excuse me a second, your Honor.

The Court: Surely.

Q. Now, when you heard the signal, or the "all gone," you have already told the jury that you didn't recognize 177
Johnson's voice; am I correct, sir? A. Yes.

Q. And now, Captain, had you proceeded beyond the rack when you noticed that Johnson was missing? A. Well, I would say I had just about gotten out clear of the long rack.

Q. So that you could see? A. About.

Q. And it is fair to say, isn't it, that the forward end of the floats were about 40 feet from the short rack when you noticed that Johnson was not on, is that about right? A. Well, no; I said that just about when we cleared the long rack that I first noticed it, which would make it maybe another eighty or a hundred feet. I

178 wouldn't know exactly, but it would be about that. It was when I got completely out in the river that I noticed that.

Q. Yes. Now, when you didn't see him, what did you do? A. I asked the mate, I said, "Where is Johnson?"

Q. Where was the mate? A. He was standing by my line, my headline, that I was shifting. He had already finished with the line between the floats.

Q. And on what float was he? A. He was then on the "53" float.

Q. And he had a good view of the "58"? A. Yes, he did.

Q. So did you? A. Yes.

179 Q. You were higher than he? A. Yes; he was on the deck of the float.

Q. And at that time, I believe—I don't know whether you told us that—the visibility was good? A. It was.

Q. When he said, "I don't know," what did you do? A. Well, I gave him orders to go and do the job that Johnson normally would have done.

Q. What was the job? A. To fasten the floats together on the other end.

Q. To square them out at the forward end? A. To square them out at the forward end, yes.

180 Q. I understand. And then you proceeded ahead? A. Then I proceeded to tie up the floats.

Q. That is at the Gates? A. At the No. 3 Gates. That is called "Gates" because the Church E. Gates Lumber Company used to own that property.

Q. Yes. Approximately—I don't know, but probably we asked that before—how far from bridges 11 and 12 is that, about? A. Well, yesterday I was asked that question, if I may say this, and I said about 300 feet, but on thinking it over, I think it is a little more; I would say it is maybe 500 feet.

Q. When you asked Johnson, or what is the name of the other fellow? A. Gaglio.

Q. When you asked Gaglio where Johnson was, at that time, were you still backing up? A. At that time I was moving ahead. 181

Q. And how long did you stay at the Gates pier, that is, at the Church E. Gates pier? A. I didn't stay there any time at all.

Q. Well, about how long? A. Well, it must have taken me, well, the elapsed time from the time I saw Johnson, that is, that I saw that he wasn't there, until I tied up at the pier 3 Gates, wouldn't be more than ten or fifteen minutes, completely tied up with them, and then I came back with a light boat.

Q. What for? A. In order to look for Johnson, and to receive further orders what to do with my boat. 182

Q. You thought it was essential to get Johnson?

Mr. Peet: I object to this, your Honor.

The Court: Yes.

Mr. Frank: I respectfully except.

Q. What time would you normally quit work, having in mind that you start at 4:30? A. The duration of eight hours, from 4:30 to 12:30 a. m. the next morning.

Q. And any number of orders may come in during that time? A. That is right. You follow out the orders that come in as you go along. 183

Q. Now, when you went back to the hole—that is where you went back to, am I correct? A. Yes.

Q. And about how much time, Captain, would you say had elapsed between the time you left the 11 and 12 bridges and the time you reached the hole? A. Altogether?

Q. Yes. A. From the time I left 11 and 12 bridges to the hole?

Q. Yes. A. The total time wouldn't be more than 25 minutes, or 30 minutes.

184 Q. Now, what did you do when you got to the hole? A. Well, upon clearing the hole, that is, moving in there with my boat, I blew the horn for the boatman, or floatman, which is three short blasts of the whistle, which meant that I wanted him to come back to the boat if he was in the vicinity and, having gotten no response, I sent Gaglio to look for him.

Q. And then? A. Gaglio reported that he couldn't find him in the Bridge Captain's office, or anywhere in Oak Point, not in the downstairs locker nor at the rope shanty, which is to the rear of that, and he asked the Bridge Master if he had seen Johnson, and he reported
185 back to me that he saw no sign of Johnson.

Q. What happened after that? A. I then instructed him to go over to 11 and 12 bridges and see what he could see, being that was the last place he had been.

Q. What was in your mind?

Mr. Peet: I object to what was in his mind.
The Court: Sustained.
Mr. Frank: I respectfully except.

Q. Why did you——

186 Mr. Peet: I object.
The Court: Sustained.
Mr. Frank: I respectfully except.

Q. Well, what happened after that? A. Gaglio reported back to me that he saw something floating in 12 bridge, in the slip.

Q. Where were you at that time? A. I was in the pilot house of my boat.

Q. Where was your boat? A. In the hole.

Q. Yes, go ahead. A. And he said, "Something is floating there. I can't just exactly make out what it is,"

and being my boat was fast, tied up there, I ordered him 187
to get a boat hook and a heaving line and go over there immediately and find out what it was anyhow, and I went along with him.

Q. Go ahead. I am sorry, Captain. A. And I went along with him, and the object we saw floating looked like a body to us, and we pulled it in, and we found that it was the body of Charles Johnson.

Q. Captain, about what time was it? A. That time would be somewhere a little after 7 o'clock.

Q. Captain, you gave some testimony at the railroad company's office, did you not? A. That is true.

Q. That is not so long ago, is it? A. That is right, yes. 188

Q. That was to Mr. Rosenthal of my office, and would this refresh your recollection as to time? That is page 19. About what time was that? It says about 7:25 or 7:30. Would that be about correct? A. If that is in my statement, that is correct.

Q. That is correct? A. Yes.

Q. Well, at that time, was it still light, or was it dusk, or dark? It was April 22nd, bear in mind. A. To the best of my recollection, at that time it was just about dusk; it was between daylight and dark, at the time that I first went over with Gaglio.

189

Q. And did you look at Johnson? A. Yes.

Q. And you recognized him? A. Yes, I did.

Q. You recognized him, you recognized the body as being that of Johnson? A. And I recognized the body as being that of Johnson.

Q. Did you look closely enough to see if there were any marks on his head? A. Yes.

Q. What did you see? A. I saw absolutely no marks of any kind.

Q. Are you sure of that? A. I am positive of that.

Q. All right. Now, Captain, there are certain customs that prevail in your trade, are there not? A. Yes.

190 Q. Such as saving men that fall overboard? A. Yes.

Q. That is a tradition of the sea, right? A. Yes.

Q. And that applies to you men in the harbor as well? A. Yes.

Q. When I say harbor, I include, of course, the river, both rivers; that is correct, is it not? A. Yes.

Mr. Peet: I object to that as immaterial in this case.

The Court: Will you read that?

(The last three questions and answers were read by the Reporter.)

191 The Court: I will take it.

Mr. Frank: Now, will your Honor indulge me a moment?

The Court: Yes.

Q. Now, Captain, when you started back on the tug, or when you start back on the tug after an operation, is it customary for you to see whether your men are back on the tug? A. Yes, it is.

Q. And is it also customary to see, where you start with floats, that your men that are on the floats are there, that is, to find out whether they are on the floats 192 or not? Is that customary? A. Yes, it is customary.

Q. Now, at the time that you heard the "all gone," you already told us you didn't recognize Johnson's voice, is that right?

Mr. Peet: We have been through all that.

Mr. Frank: Well, I am leading up to something in the testimony, Mr. Peet. May I proceed?

The Court: Yes, go on.

Q. Do you know whether it was a bridgeman's or a floatman's voice that you heard? A. I couldn't—how would I

say it? I couldn't know whether—I couldn't say whose 193
voice it was at that distance.

Mr. Frank: I think that is all.

Cross examination by Mr. Peet:

Q. Captain, what license do you hold? A. Do you want me to describe the territory it covers?

Q. Well, is it for New York Harbor? A. Yes, it is for New York Harbor from Narrows, to the Stepping Stones in the East River.

Q. Is that a captain's license? A. It is a master's license 194
and it is for freight and towing, that is, it is a qualified master's license for vessels of 500 tons, and it also covers Kill von Kull to Elizabethport and the Hudson River as far as Yonkers.

Q. How long have you held that license? A. About 19 years.

Q. And how long have you been working with railroad tugs and carfloats in any capacity? A. About 26 or 27 years, roughly.

Q. Now, Johnson, the man involved in this case was an experienced man in his work, was he not? A. He was.

Q. Was he a good swimmer? A. He was. 195

Q. In float bridges 11 and 12, is there a stairway leading down into the water? A. There is a stairway under the apron of the bridge.

Q. Is that on each side of the bridge? A. It is.

Q. And does it run down into the water? A. Right down into the water at any stage of the tide. The steps show clearly in the photograph.

Q. A person falling in the water at bridge 11 or 12 can, at any stage of the tide, get up those steps? A. Yes, he can.

Q. And he can also walk ashore, can't he? A. Yes, he

196 could, under the bridge, under the apron of the bridge. The apron is the part that goes up and down.

Mr. Frank: Is that the way you said it, "The apron of the bridge"?

The Witness: Yes.

Q. Does part of this stairway show in this picture that I hand over to you now (handing picture)? A. Yes, that stairway shows clearly in the picture.

Q. That is the only stairway that does show in that picture, isn't it? A. Yes.

197

Mr. Peet: May I offer that in evidence?

Mr. Frank: May I see it?

Mr. Peet: Yes (handing paper).

Mr. Frank: May I see one of those photographs, your Honor, please?

The Court: Yes, sir (handing papers).

Mr. Frank: I have no objection to the photograph.

(Marked Defendant's Exhibit A in evidence.)

198 Q. As you look at this Defendant's Exhibit A, is the stairway located in the righthand portion of the picture?

Mr. Frank: I wonder whether he would put an "X" on it so the jury can see it.

The Witness: Yes, the stairway is located in the righthand portion of it.

The Court: He is testifying where the stairway is. That is good enough, I think.

A. (Continuing) The stairway shows clearly in the righthand portion of the picture and then there is also a hand rail there.

Mr. Peet: Might I show that picture to the jury? 199
The Court: Yes, you may show it to the jury.
(Picture is handed to the jury.)

Q. Captain, would you tell us how the lines running from the long rack in 11 and 12 bridges to the short rack are made fast on the racks and carfloats in there? A. Well, there was a long rack line put out on each float, two parts, what I would call two parts, on the long rack leading across. The purpose of that line is to hold the float steady while it is fast to the bridge when the toggle pins are in position, holding the cartracks together, so that you may take off or put on cars on the float. 200

Now, the long rack lines can be let go by a man standing on the long rack and throwing it off, because it is two parts, in other words it is on the long rack and the bight.

The Court: Suppose you make it plain.

By the Court:

Q. One rope is tied to something securely and one rope is tied securely on the float? A. That is right, your Honor.

Mr. Peet: It is not tied, your Honor. 201

By the Court:

Q. And a man releases the rope and throws it down on the float? A. That is not true. When I say the "bight" I means two parts, he throws it on and pulls it and leaves it there.

Q. Does Johnson have to help him do that? A. Yes, it would be part of his duty.

Q. Johnson would take it off? A. If it were necessary.

Q. And then he would throw it off? A. Yes.

Q. All right. A. But it is not fast on the float.

202 Q. Was your bridgeman on there that night? A. I didn't see any.

Q. If there was no bridgeman, could Johnson do the work alone? A. Yes, he could, but it would take more time.

Q. You didn't see any bridgeman there, and if there wasn't a bridgeman there, Johnson could release these lines? A. Yes, sir.

Q. Now, it was Johnson's duty to release these lines? A. Yes.

Q. And it was Gaglio's duty to release some other lines? A. That is right.

203 Q. After you got all the lines released, you would get some kind of a signal, "all gone," or "all clear"? Is that right? A. Yes.

Q. And then you would pull out? A. Yes.

Q. And, now, the position that Johnson was in on float "58", if he was up at the bow of that float, taking care of those lines, could you see him from where you were standing? A. No, your Honor.

Q. You would not know or see if he was on the float until you got clear of the long rack, would you? A. Clear of the short rack.

204 Q. Then you would see if he was on the float? A. Then I would see if anyone was on the float.

Q. In addition to looking at the float, you have to look at traffic in the river, don't you? A. That is right, your Honor.

Q. But you did see that he wasn't on the float? A. Yes, after I got the float out.

Q. But you proceeded without him? A. Yes, I did proceed without him.

The Court: All right, go ahead.

By Mr. Peet: 205

Q. I show you this picture here, Captain, and ask you if that gives some idea of the view you had at the time you received the "all gone" signal. A. That would be approximately it.

The Court: Let me see it. (Paper is handed to the Court.)

By the Court:

Q. Well, this picture shows—it doesn't show the float or the—it shows the dock, doesn't it? A. Yes, sir. That is not a dock. We call it a rack. 206

Q. A rack? That is stationary, isn't it? A. It is.

Q. And how much distance is there to the right of the float, or do you know? A. I don't understand your question.

Q. Well, the float comes up against this track, doesn't it? A. Those tracks are on the float.

Q. These are on the float? A. Yes; that is for the purpose of floating freight cars.

Q. This is the "53"? A. That is right.

Q. And the "58", is that it (indicating)? A. No, next 207 to it.

Q. Where Johnson would work, that would be in that corner (indicating), wouldn't it? A. Yes, that is right.

Q. And that rack would prevent you from seeing him until it is clear? A. That is right, your Honor.

The Court: All right.

Mr. Peet: I offer that in evidence.

The Court: Oh, I think we will take a five-minute stretch.

(Short recess.)

208 Mr. Peet: I offer that in evidence.
Mr. Frank: No objection.
Mr. Peet: May we have it marked?
The Court: Yes.

(Marked Defendant's Exhibit B in evidence.)

By Mr. Peet:

Q. What was the next move that Johnson was to do after he had removed the rack lines from the short rack of 12 bridge? A. And what was he supposed to do?

209 Q. Yes? A. What he was supposed to do was remain where he was and then fasten the two floats together when they came together.

Q. Now, at the time that you got the "all gone" signal, could you see all the lines except the line from the short rack to the 12 bridge? A. I could see every line and I could see that every line had been let go except the short rack line in 12 bridge.

Mr. Frank: That you couldn't see? I didn't get that.

The Witness: That is the only one I couldn't see.

210 Q. And did you pull the floats out without any trouble? A. I pulled the floats out with no trouble at all.

Q. And later on you found that that line had been unloosened, that is, the line from the short rack of 12 bridge? A. Yes, I did.

Q. Now, after receiving the "all gone" signal, the next thing you did was to sound this slip whistle that has been referred to, is that right? A. That is true.

Q. And that is your regular practice, is it, to do that? A. That is right.

Q. And the next thing, after sounding the slip whistle, was to start moving backwards, pulling these floats out, is that right? A. That is right.

Q. And that is done gradually, is it? A. That is right, 211
that is done gradually.

Q. Now, when you are in that position pulling those floats out with the floatman up at the very end of the outside float where you can't see him, can you, in most cases, identify who shouts "all gone"? A. If I see the man that is shouting "all gone," then I can identify him.

Q. Well, about how far away from you is it at that point?

Mr. Frank: At what point?

Q. (Continuing) When he is up unloosening the line from the short rack of 12 bridge, and you are up at the 212
pilot house? A. Over 300 feet.

Q. How wide are the carfloats? A. 40 feet each.

Q. Well, at that distance, can you normally identify any particular person's voice? A. No, I cannot identify a voice at that distance.

Q. Now, at any time while you were pulling the floats out, or on your way up to Pier 3 of Church E. Gates, did you hear any call for help? A. No.

Q. Did you hear any call of any kind? A. No, no call of any kind.

Q. Did you hear any splash or a sound as if something 213
was falling into the water? A. No.

Q. Did you hear any commotion in the water or did anything unusual happen to attract your attention? A. No.

Q. Now, when you got back to 12 bridge finally, and Johnson was removed from the water at that point, he was given artificial respiration, is that right? A. That is right.

Q. And it didn't have any effect at all? A. No, it didn't.

Q. Did they get any water out of him? A. I didn't see any water come out of him.

Q. Now, at the time that you first noticed that Johnson was apparently not on the carfloats, how long would it

214 have taken you if you had then brought the carfloats into bridges 11 and 12? A. Well, it would have taken considerably longer than to take them up to Pier 3 Gates, because then I would have had to turn them around, turn the boat around, and get three lines out and make fast, and maneuver in different ways to get back in there again.

Q. Now, during the time that the carfloats were being removed from 11 and 12 bridges, and while you were going up to the Church E. Gates property, were your engineer and fireman and oiler all below decks at that time? A. So far as I know, they were, yes.

215 Q. You didn't see any of them above deck? A. I didn't see any of them, no.

Mr. Peet: That is all.

Re-direct examination by Mr. Frank:

Q. Captain, this stairway that you pointed out on Defendant's Exhibit A, how far in from the end of the apron is that? Do you want to see the other one too? A. This one doesn't show the apron.

Q. How far in is that? I am showing you the other one too. A. Well, I would say about 18 to 20 feet.

216 Q. From the edge of the apron? A. From the edge of the apron in to the stairway.

Q. Now, when Johnson was pulled out, did you see froth or bubbles come from his mouth? A. I did see some froth come out of his mouth.

Q. Tell me something, Captain, and it is the last question I want to ask you: With your experience and with your being on the waters and the sea for a good many years, is it more important, as a tradition of your calling, to rescue lives or to guard property.

Mr. Peet: I object to the question as an improper question.

John J. O'Brien—for Plaintiff—By the Court.

The Court: Yes, sustained; it is a very improper question. 217

By the Court:

Q. You have got two carfloats here. I want the jury to get a little better picture of what you have to do. I don't think they have it too well.

As you are backing out of this, out of these two aprons, bridges, right? A. Yes, your Honor.

Q. What speed did you have astern, going backwards, that is, a couple of knots an hour? A. It would be very low speed, your Honor. 218

Q. Would it be two knots an hour? A. If it would be two knots an hour, that is about all it would be.

Q. Then you get floats clear of the pier and turn them around, is that right? A. That is right, your Honor. It takes a good while to get in momentum, to get any momentum on them.

Q. That is right. Then, if you wanted to go back into these bridges, you would have to reverse your speed? A. I was going in reverse, but I would have to make different maneuvers to get them back there. What I want to make clear is that it would take much more time to get them back where they were before than to put them where I was ordered to put them, or I intended to put them. 219

Q. It was better to put them where you did and then come back and look for him, is that it? A. It was, your Honor, yes. I could do that much more quickly.

Q. That is your opinion, of course. A. Yes, that is my opinion, your Honor.

Mr. Frank: Is that all, your Honor?

The Court: That is all.

220 By Mr. Frank:

Q. Could you have let the floats go and go back to look for him?

The Court: And hit the other boats in the river?

By the Court:

Q. You could have left all lines go and you could have let the floats go, is that right? A. Yes, sir.

Q. How could you pick them up then afterward? A. I
221 would go and chase them and pick them up.

Q. And if the tide was too much, what would you do? A. Well, if I couldn't pick them up, I would be guilty of doing something wrong.

Q. Well, as a matter of fact, you aren't allowed to let your lines go and let any boat go, are you? A. According to law, you aren't allowed to let anything go adrift; you must secure it.

The Court: All right.
Mr. Peet: That is all.

222 By Mr. Frank:

Q. Your momentum at that time was very little on the floats themselves? A. That is true.

The Court: Less than two knots.
Mr. Frank: Less than two knots.

By the Court:

Q. That is about two miles? A. A knot is more than a mile, your Honor; I would say about three miles.

Mr. Frank: That is all. 223

Mr. Peet: That is all, Captain.

The Court: I want you to stay here a little while, Captain.

The Witness: Can I go out and have a smoke?

The Court: Sure, but be around the court.

Mr. Frank: Shall I proceed, sir?

The Court: Yes, go ahead.

Mr. Frank: Captain Holmes, would you come up, please?

224

CHARLES F. HOLMES, called as a witness on behalf of the Plaintiff, having been first duly sworn, testified as follows:

Direct examination by Mr. Frank:

Q. How old a man are you? A. 67, going on 68, sir.

Q. And what was your business? Are you retired now? A. Yes, sir.

Q. And whom did you work for before you retired? A. The Pennsylvania Railroad.

Q. For how many years did you work for them? A. 225 From 1914 to 1944.

Q. And in what capacity? A. Captain.

Q. Of what? A. Of the tugboats and steamlighters.

Q. A number of them? A. A number of them, yes, sir.

Q. And during the course of the years that you were working for them, did you move carfloats of the Pennsylvania Railroad Company? A. Yes, sir.

Q. In and about the harbor of New York? A. Yes, sir.

Q. That was your regular occupation? A. Yes, sir.

Q. And when did you retire? A. 1948. No, 1949.

Q. Now,——

226 By the Court:

Q. You said a minute ago that you retired in 1944. A. Yes, from the Pennsylvania Railroad.

Q. Where did you go from the Pennsylvania Railroad Company? A. Mesick Towing Lines.

Q. What did you do there, operate a tug for them? A. Yes.

Q. From 1944 to 1949? A. Yes, from 1944 to 1949.

Q. And that is when you quit and retired? A. Yes, sir.

The Court: All right, go ahead.

227

By Mr. Frank:

Q. Now, Captain, in the work of tying up the carfloats, or taking them out of slips, there are certain customs and practices, are there not? A. Yes, sir.

Q. Are you acquainted with them? A. Yes, sir.

Q. And have been for a good many years? A. Yes, sir.

Q. In coming out and taking out——

The Court: Now, he is not qualified yet, Mr. Frank. I suppose he is qualified as to the Pennsylvania Railroad, or he may be qualified as to the Pennsylvania, but he is not qualified generally yet.

228

Mr. Frank: All right. We will find out.

Q. Are you acquainted with the tugs involved or operated by the New York, New Haven & Hartford Railroad Company? A. Yes.

Q. Are you acquainted with them? A. Yes, sir.

Q. Have you seen them often? A. Yes, quite often.

Q. And are you acquainted with the carfloats operated by the New York, New Haven & Hartford Railroad Company? A. Yes, sir.

Q. Will you look at these two photographs, Plaintiff's Exhibits 1 and 2 (handing)? Have you seen and are you acquainted with the carfloats of that type? A. Sir? 229

Q. Those two photographs that I have indicated as Plaintiff's Exhibits 1 and 2, will you look at them? A. Yes, sir.

Q. Have you, during your years of working around the harbor, become acquainted with that type of carfloat? A. Yes, sir.

Q. And the Pennsylvania carfloats, are they bigger or smaller, or are they the same size? A. The same size, and some are smaller.

Q. And have you operated, during your years with the Pennsylvania Railroad Company, and have you had occasion to tow and move floats of the same type as indicated there on Plaintiff's Exhibits 1 and 2? A. Yes, sir, and bigger. 230

Q. And bigger? A. Yes, sir, and bigger.

Q. As well as smaller? A. Yes, bigger and smaller than these floats, yes, sir.

Q. Do you know this particular point we have been talking about, Oak Point, that is? A. Yes, sir.

Q. Up in the river? A. Yes, sir.

Q. Have you been there many times? A. Once. 231

Q. You mean for an operation? A. Yes, for an operation.

Q. In coming out of bridge Nos. 11 and 12——

Mr. Peet: Your Honor, please, I don't think this witness is qualified except to testify what was done on the Pennsylvania Railroad.

The Court: No, I don't think he is qualified. If you want to qualify him as an expert in and around the Port of New York, it is my view that you have to qualify him as to what a number of railroads

232 did, and not just the one he worked for, because a railroad may have a special rule which applies to that railroad, but that doesn't prove a custom and practice. You are getting into the realm of the common-law rule.

Now, you have got to show that he knows and saw what, in the course of years, other railroads did under similar circumstances.

Mr. Frank: All right, your Honor.

By Mr. Frank:

233 Q. Now, during the years from 1914 to 1944 while you were employed by the Pennsylvania Railroad Company was your work confined in and around the harbor of New York? A. Yes, sir.

Q. And did you see other floats and railroads and how they worked? A. Yes.

Q. Have you observed operations of the New York, New Haven & Hartford tugs and floats during those years? A. Yes, sir.

Q. Have you observed any other railroad besides the New Haven and the Pennsylvania? A. Yes, sir.

234 By the Court:

Q. You have observed other railroads besides the New Haven and Pennsylvania? A. Yes, sir.

Q. What other railroads did you observe and where? A. The Erie Railroad over in Jersey.

Q. The Erie Railroad over in Jersey. Go ahead. A. The New York Central Railroad in Jersey.

Q. What other? A. The Jersey Central.

Q. The Jersey Central. Go ahead. A. And Lehigh Valley.

Q. The Lehigh Valley. All right. You observed those? 235
A. Yes, sir.

By Mr. Frank:

Q. Now, I want you to assume that, at a certain time in the operation of taking out of two slips indicated by Plaintiff's Exhibits 1 and 2, those two photographs, which have been designated as 11 and 12, the captain of the tug does not see the floatman when he is on the forward corner taking care of a line. Is there a custom as to——

The Court: Custom or practice. 236

Q. (Continuing) Is there a common practice and custom in and about the harbor of New York on tugboats moving tows or floats of that kind as to what the captain has to do before proceeding ahead? A. Sure there is.

Q. What is that custom? A. The custom is——

Mr. Peet: If your Honor please,——

Q. (Continuing) What is the practice? A. The practice?

237

Mr. Peet: I think it is immaterial what the practice is.

The Court: No, I will let him answer.

A. (Continuing) The practice is to find out when the floats is gone, who is the man who is letting the float go, and see him before you go out.

Q. Now, you say the custom is to find out if the float is gone. A. That is right.

Q. What do you mean by "if the float is gone"? A. Gone from the racks, the bridges.

238 Q. You mean the line, do you? A. Yes, the line, sure.

Q. I want you to assume that the man in the pilot house, the captain, can't see the man out there. Now, when he can't see him, what is the custom, what is the practice about how he finds out? A. To wait for a signal from the man that it is all gone.

Q. And when you say to wait for a signal from the man, what do you mean by that? A. What do I mean by that?

Q. Yes. Suppose you don't know it is the man?

The Court: No, no.

239

By the Court:

Q. What does that mean, the signal "all gone"? A. That means that the floats is ready to go out.

Q. Where is the man when he gives the signal? A. Well, he can be in or around the float, that is, the bow end, or a little up or to the side.

Q. He can be almost anywhere? A. No, no, that particular place where he is supposed to let the lines go.

Q. He can be where he can let the lines go? A. Yes, sir.

240 Q. And he gives the signal "all gone," or "all clear"? A. That is right.

Q. And then what does the captain do? A. Well, then he pulls out if he knows that it is his own man signaling over to him to let them go.

Q. He pulls out if he knows it is his own man? A. Yes.

Q. Suppose he is 350 feet away. A. Well, then, if he can hear him——

Q. Suppose he hears the signal but he can't see the man? A. Well, if he recognizes the voice——

Q. Do you mean that in the 34 years you recognized all the voices that said "all gone"? A. No, no. 241

Q. You know you can't recognize the voice that far away, don't you? A. No, that is right, your Honor.

Q. What did you do then? A. I sent another man over.

Q. You mean you sent another man to go back there to see if it is all right? A. No. I took my time. This particular time the float was light, and he didn't have to cross all the way, he only had to walk across to 58 to see if the man was on the rack, standing by that line, see where it was.

Q. You mean there is a practice and custom to this extent in the Port of New York? A. Yes. 242

Q. And you did it in all the jobs you did? A. Not all the jobs.

Q. Not all the jobs? A. All the jobs, no.

Q. You have to do it on all jobs or it is not a practice. A. Ninety-nine out of a hundred.

Q. Did you see every other captain do that ninety-nine times out of a hundred? A. I have seen it done.

Q. Did you ever see them fail to do it where they couldn't see the man? A. No.

Q. Then it is a hundred times out of a hundred, not ninety-nine out of a hundred, isn't it? A. That is right, sure. 243

Mr. Frank: May I proceed, your Honor?

The Court: Yes, go ahead.

Mr. Frank: Your Honor knows I do that with all respect to your Honor. May I object to the latter part of the Court's question upon the ground that even a custom and practice, even if it is violated from time to time, that doesn't destroy the customary practice.

The Court: Yes, but this jury has a right to

244 find out how much belief to place in this man, because he is a paid expert, right?

Mr. Frank: Right.

By the Court:

Q. You are being paid for your day in court, aren't you? A. I expect to be paid.

Q. Have you made any arrangement for pay? A. Yes, sir.

Q. How much a day are you getting? A. I don't know. I didn't ask for any certain amount.

Q. Well, what do you expect to get? A. I don't know.

245 Q. Do you mean to say that you come to court as an expert and you don't know how much pay you are going to get for each day you have been here? A. No, sir, I don't know.

Mr. Frank: I want also to state that I want to assure him that I will pay him.

The Court: I am going to rule that he is a paid expert, and he comes under the rule of evidence that requires a charge to the jury that he is a paid expert.

Mr. Frank: There is no question that he is.

246 The Court: I want to clear that up so I can get my charge in shape.

Mr. Frank: May I proceed, sir?

The Court: Yes.

By Mr. Frank:

Q. Is there any danger in proceeding ahead without knowing whether the "all gone" signal came from your man or from some bridgeman? A. Yes, sir, there is.

Q. What is the danger? A. The man is apt to let the lines go from the cleats or bitts, whatever they might be, and he may get tangled up in them, get his hands jammed

up in the line, get his feet jammed up in the line, or he falls overboard at the same time. 247

Q. Is that why it is essential to recognize that the man who is on the line said "all gone"? A. Yes, sir.

Q. Now, Captain Holmes, I want you to assume that, after the tug had pulled out of the slip, and while backing up, the floatman's absence was noted by the captain, and it was noted after it cleared the short rack, which is 40 feet in length, and I ask you to further assume that at that time the captain in the pilot house had a view of both floats "53" and "58" all the way, and the captain discovered that the floatman was not on board. 248

Is there a customary practice in the harbor of New York among tugboat captains engaged in a similar operation as to what they are to do under those circumstances?

Mr. Peet: I object to the question.

The Court: Yes or no.

A. Yes, it is.

Q. And would you be good enough to tell us what the customary practice is under those circumstances? A. To find out where the man is.

By the Court: 249

Q. What would you do? Here is a fellow pulling out, and he has two floats. What would you do if you were the captain? What is the custom and practice? A. I would find out where the man was.

Q. What would you do to find out? A. I would stop the float and go round to see where the man was.

Q. How long would it take you to stop the float going out of the pier, 300-foot floats, that is? A. About two minutes.

Q. Then what would you do? A. Find out where the man was.

Charles F. Holmes—for Plaintiff—By the Court.

250 Q. Where? A. In the bridges.

Q. How could you get on to the bridges? A. You don't have to go to the bridges, you go to the short rack.

Q. He is clear of the short rack. A. You can go between the floats to see.

Q. How can he get in there? A. There is room in there.

Q. The captain testified that he saw that this man was missing when he cleared the short rack. A. Yes, sir.

Q. Now, it would take him some distance to stop, wouldn't it, Captain? A. At two knots, you could stop in about 15 seconds.

251 Q. You can stop a boat going two knots with two 300-foot lighters in 15 seconds? A. Going back in the position he was in, he had to go ahead with them.

Q. What would you do with your engines? A. If you were going to go back——

Q. You say you can stop your engines in 15 seconds? I am asking you about what you would do with your engines? A. I would stop the boat and go ahead.

Q. You would have to give bells to your engine-room, wouldn't you? A. That is right.

Q. That would take five or ten seconds to get the bells down there, wouldn't it? A. No, it would not.

252 Q. It wouldn't? A. No.

The Court: All right; you may go ahead.

By Mr. Frank:

Q. Will you explain what you would do? The Court asked you what you would do with these floats at the point indicated. A. I would have stopped the way on my floats by going ahead, and then let the lines go from the floats, and then run around the other side.

Q. With what? A. With the tugboat.

Q. With the tugboat? A. Yes.

Q. The Judge did ask the captain about the floats running loose. Will you tell us about that? A. They would stay in the slip. They wouldn't go any place, by stopping your tow. That is only about two minutes' work. 253

By the Court:

Q. You mean you would leave the floats free of lines? A. Yes, sir.

Q. Do you know what the tide was at that time, Mr. Holmes, where it was running? A. It was ebb tide.

Q. What does that mean? A. It was going out. 254

Q. The floats would go out, wouldn't they? A. If you were inside——

Q. We are talking if he was outside the rack, and you got an ebb tide, and it was going out, the floats would go with the tide, wouldn't they? A. Oh, yes.

Q. Do you think you could pick up two carfloats that were loose in the harbor? A. Yes, you can get them. Of course, they might run into something else.

Q. Sure, and kill three other people. A. I wouldn't say, "kill three other people."

Q. But it is possible, isn't it? A. Sure, it is possible. 255

By Mr. Frank:

Q. The testimony is, when the captain noticed that the floatman was not on, he was just clearing that short rack. How about that long rack? Would that help to keep the float in position in the slip? A. That is my argument.

Q. Would you just look at this photograph and point out what you mean by that? A. Here he could have put a line out on the long rack to hold it.

Q. And hold it? A. Hold the floats.

Q. How long would that take? A. The way the situa-

256 tion was is that the float was up against the rack altogether——

By the Court:

Q. How would he throw a line on to the long rack? A. Throw a line?

Q. He would throw a line, and who would be there to receive the line? A. He can throw one up.

Q. Who would tie it? A. A man.

Q. Who would have to get on the long rack, he would have to get on the long rack to tie it, wouldn't he? A.
257 I don't think so, your Honor.

Q. Somebody would have to tie it on the long rack, whether a bridgeman did it or a floatman. Let us be practical. A. That is right.

Q. He would have to get up to tie it? A. He would.

Q. He would first have to throw it up and then tie it? A. He would have to take the line and put it on the rack.

Q. He would have to go on the rack, wouldn't he? A. No, sir.

Q. How could he make it fast? A. He would throw it.

Q. Over what? A. One of the spiles on the rack.
258

Q. He would have to hit the spile? A. Yes, they do it.

Q. If he didn't hit it, he would have to do it again? A. Yes.

The Court: All right, go ahead.

By Mr. Frank:

Q. Is there anything unusual in seamen, dockmen, and sailors throwing a line on a spile? Is there anything unusual about it? A. No, that is every day performance.

Mr. Frank: You may cross-examine.

Cross examination by Mr. Peet: 259

Q. Captain, you said you had been in to the Oak Point float bridges exactly once, is that right? A. That is right.

Q. And how many years ago was that? A. 1934.

Q. What bridges did you go into on that occasion? A. 14 and 15. I had two floats.

Q. How many carfloats did you have? A. Two.

Q. And that is the only time you were up there? A. That is the only time I was up in Oak Point.

Q. On that occasion what crew did you have? A. I had my own crew.

Q. How many? A. Three, floatmen, mate, and the deckhand. 260

Q. And you were in 14 and 15 bridges? A. No; I made a mistake; I mean 12 and 13.

Q. It was 12 and 13 you went into? A. Yes.

Q. On those bridges, when you come to pull out, or when you came to pull out on that occasion, could you see your floatman when he was untying the lines? A. No.

Q. Did you wait until you could see him? A. Yes.

Q. You remember that clearly? That happened in 1934? A. Yes, because we were lying between the two floats all the time we were up there. 261

Q. Have you ever been in the float bridges over at the Brooklyn District Terminal, Eastern District Terminal? A. Yes, quite often.

Q. Just with the Pennsylvania floats? A. That is right.

Q. What kind of float bridges do they have? A. They have pontoon bridges.

Q. That is not like this kind of bridge? A. No.

Q. Have you ever been in to the New York Dock Company's float bridges? A. No, I was never in there.

Q. Have you ever been in to the Jay Street bridges? A. Once.

262 Q. How long ago was that? A. Quite some time ago; I don't remember exactly when.

Q. How much room is there there for a float? A. There is room for one float.

Q. There is room for one float? A. Yes.

Q. That is not like this situation, is it? A. No, it is not.

Q. Have you ever been in to the Delaware, Lackawanna & Western float bridges in Jersey City? A. Several times.

Q. And what kind of float bridges do they have? A. Pontoon bridges.

263 Q. That is not like these, is it, Captain? A. No, sir, it is not like these.

Q. Have you ever been in to the Erie Railroad float bridges in Jersey City? A. Yes, sir, several times.

Q. When was the last time you went in there, Captain? A. 1940, that was.

Q. That was in 1940, was it? A. Yes, that is right.

Q. Have you ever been in to the Central Railroad of New Jersey in Jersey City? A. Yes, several times.

Q. When was the last time you were in there, Captain? A. Around 1938 or 1939 or 1940. I was working nights at the time.

264 Q. Are there any other float bridges you have been in to in the New York harbor? A. Bay Ridge and Greenville.

Q. Your testimony as to any custom or practice, other than on the Pennsylvania, is based on these one or two occasions? A. I was working for the Bay Ridge and Greenville for two years, and we handled floats all the time.

Q. I am talking about the other railroads. A. That is the same thing.

Q. Well, they didn't go into Bay Ridge and Greenville, did they? A. No, they don't.

Q. So your testimony about some custom and practice,

other than the Pennsylvania or the New Haven, is based on an occasional time that you may have been in float bridges in New York harbor? A. No, it is a regular run of business. It is almost the same all over. 265

Q. How can you say it is the same when you have only been in once or twice? A. I have been talking to the men.

The Court: Strike that out.

By the Court:

Q. Is your testimony of custom or practice based on talking to the men? A. No, no. 266

Q. If it is it all has to go out. It is what you saw, is that right? A. That is right.

By Mr. Peet:

Q. Now, when you went into these float bridges on one or two occasions you were interested at that time in the way they did the operation, is that right? A. No, certainly not.

Q. Did you hang around to see just how they did it? A. No.

Q. On every occasion that you went in one of these float bridges, did you wait to see when they were ready to pull the floats out and whether a captain sent a man to locate the floatman before he pulled out? A. I have seen that several times. 267

Q. You have seen that several times in your entire career? A. Sometimes in what?

Q. Several times in your career. A. Yes.

Q. On what railroads? A. Any railroad.

Q. Now, you say you have seen it done several times and I ask you now on what occasions did you ever see such a thing. A. When I happened to be there.

268 Q. Did you ever see it at the Central Railroad of New Jersey float bridges? A. Yes, sir.

Q. When? A. When I was in there with the floats.

Q. How many years ago was that? A. Between 1924 and 1940.

Q. And you sat around with all the other work you had to do and watched this whole operation to see whether the captain was positively to identify the voice of the floatman when he called "all gone"? Is that what you did? A. No, I didn't do that.

Q. You don't know anything about this case then. A. I had to look around what the other fellows was doing, and
269 they were doing the same as I was doing with my boat.

Q. Now, you yourself and your boat often have had cars on these carfloats? A. Yes, off and on.

Q. And when you are pulling floats out from the float bridges with cars on, you can see where your man is on the float? A. No, I can't.

Q. And you don't know whose voice it is when he calls out "all gone"? A. I make it my business to find out.

Q. Do you have an extra man to run up 300 feet to see if the man whose voice you hear is the right man's voice? A. No.

270 Q. Whom did you send up? A. If I didn't see them, I may send up my man.

By the Court:

Q. How do you find out if it is the right man's voice? A. I look for the man. If I don't see him, I send a man up.

Q. Whom would you send up? A. Either the mate or the stern man, to see if he sang out "all gone."

Q. If you couldn't see the man and you couldn't recognize the voice because it is too far away, you would make sure, so you would send a man down to see if the

man who is supposed to shout "all gone" was the man who said it? Do you really mean that? A. Yes. 271

The Court: All right.

By Mr. Peet:

Q. And you had done that on every occasion? A. On every occasion.

Q. And if it is that man's duty, and if it is the floatman's duty, to release that particular line, and you hear the "all gone" from the float in that position, don't you assume that is the floatman who gave the "all gone"? A. I have 272 to be sure.

Q. You have to be sure? A. Yes.

Mr. Peet: That is all.

Mr. Frank: That is all.

The Court: That is all.

Mr. Frank: Should I put another witness on the stand?

The Court: What have you got, an expert?

Mr. Frank: No, not an expert, not a virtual expert.

The Court: I want to bring this captain back, 273 Captain O'Brien. We will call the widow at 2 o'clock. I just want to ask him one question because it is in line with this.

JOHN J. O'BRIEN, resumed:

By the Court:

Q. Captain O'Brien, you testified as to how you did the work on this float that night; is that right? A. Yes, your Honor.

274 Q. And you have been doing the work the same way for the 19 years that you were a captain? A. Yes, your Honor.

Mr. Frank: May I ask him a question, your Honor, so long as you put him back on?

The Court: Yes.

By Mr. Frank:

Q. Well, look, there are bridgemen there, whether you see them or not, aren't there? A. Yes.

275 Q. You couldn't say it was the bridgeman who said his line was all gone or whether Johnson said his line was all gone? A. No, but the bridgemen don't stay there. They are assigned to different parts of the yard. When they finish, they go elsewhere.

Q. That is not what I asked you. The bridgeman——

By the Court:

Q. It could have been the bridgeman or it could have been Johnson that gave it? Is that right? A. There is a possibility, but the bridgeman isn't supposed to be on the

276 float.

Q. I am asking if it is a possibility? A. Yes.

Q. You didn't recognize the voice, so it could have been either Johnson or the bridgeman? A. I don't know who it was.

By Mr. Peet:

Q. And it wasn't the bridgeman's duty to release that line? A. No, not that line.

Q. Not the last line? A. No, it was strictly Johnson's duty to release that last line.

277

Mr. Peet: That is all.
Mr. Frank: That is all.
The Court: All right, until 2 o'clock.
(Recess taken until 2 o'clock p. m.)

AFTERNOON SESSION

MARGARET JOHNSON, called as a witness in her own behalf, having been first duly sworn, testified as follows:

278

Direct examination by Mr. Frank:

Q. Mrs. Johnson, you are the widow of Charles Johnson? A. That is right.

Mr. Frank: I offer in evidence a certificate of Letters of Administration.
Mr. Peet: No objection.

(Marked Plaintiff's Exhibit 3 in evidence.)

279

Q. Mrs. Johnson, how long were you married to Mr. Johnson? A. Since 1927.
Q. And did you know him before you married? A. Yes, six months before.
Q. And how many children are there as a result of that marriage? A. Two.
Q. In 1946, how old was Mr. Johnson, that is, at the time he died? A. 41.
Q. And where was he born? A. In the United States.
Q. And the children at that time were who? Also tell us what age they were in 1946. A. Audrey was 15 and Charles was 17.
Q. And Charles is now where? A. In the Army.

280 Q. During the time that you knew your husband before and after you married, did he ever have any serious illness? A. No, sir.

Q. Was he ever in any hospital? A. No, sir.

Q. The accident we now determined, we have now determined, happened on a Monday. You know that, don't you? A. Yes, sir.

Q. And what time did he leave the house, Mrs. Johnson? A. At 3:30.

Q. And where did you live at that time? A. At 171 East 99th Street.

281 Q. That is in Manhattan, is it, Mrs. Johnson? A. Yes, sir, that is right.

Q. And what had he been doing before he left the house? A. My husband?

Q. Yes. A. He was listening to the ball game on the radio.

Q. And was he happy on the day he left? A. Yes, sir.

Q. Was he a good husband, Mrs. Johnson? A. Yes, sir, he was.

Q. And he was a good father, was he? A. Yes, sir, he was.

Q. And about how long had he been working for the
282 railroad? A. For nine years.

Q. For the New Haven? A. Yes, nine years.

Q. And, before that, whom did he work for? A. He worked for Borden's.

Q. Borden's Milk Company? A. Yes.

Q. Did he work for anybody else? A. Reid's ice cream.

Q. About how much would he give you every week during the years that he worked?

The Court: Stipulate that it is three years.
Mr. Frank: I have it. They gave it to me.
The Court: What is it?
Mr. Frank: Three years.
The Court: That is what year?

Mr. Frank: 1946 is the year he died in. 283

The Court: You get two years more. Get 1945 and 1944.

Mr. Frank: In 1944—those are the figures given me by the railroad—$2350.35.

The Court: How much was it for 1943?

Mr. Frank: $2,350.35 for 1944, and 1945, $2,719.53. Do you want me to go on?

The Court: Have you 1943?

Mr. Frank: Yes, 1943 is $1,867.59.

The Court: That is all I need. That is a good average. You take a three-year period, and divide it by three. 284

By Mr. Frank:

Q. About how much—let us take the year before his death; I am talking about 1945—about how much would he give you a week on the average? A. About $45.

Q. $45 a week? A. Yes.

Q. Would you give him any part back? A. Well, I gave him his carfare.

By the Court: 285

Q. Very little, wasn't it? A. Yes.

By Mr. Frank:

Q. I know it couldn't be very much. A. No, it wasn't very much.

Q. Now, were you home when he left your house at 3:30 in the afternoon? A. Yes, sir.

Q. And where did you see him next? A. I next seen him Wednesday at the funeral parlor.

286 The Court: I think I will stipulate the death was caused by——

Mr. Frank: At this time I offer into evidence the certificate of death.

The Court: Strike that out, that is, my remarks.

(Marked Plaintiff's Exhibit 4 in evidence.)

Mr. Peet: I object to what she may have seen.

The Court: Oh yes, we are going to strike that out.

Mr. Frank: I am coming to a very important
287 point, your Honor.

The Court: If you have any objection make it.

By Mr. Frank:

Q. When you were in the funeral parlor, did you see any marks on his head? A. Yes, sir.

Mr. Peet: I object to that.

Mr. Frank: Just wait until he says it is all right.

By the Court:

288 Q. Did you see any marks on his head; yes or no? A. Yes.

Mr. Peet: I object to the question. This man had an autopsy performed.

Mr. Frank: There was no autopsy; that is the point.

Mr. Peet: There was an autopsy.

Mr. Frank: I tell you there was not. Let us not argue about it.

The Court: I will accept that.

Mr. Peet: All right; I object.

By Mr. Frank:

Q. And where were the marks on his head? A. On his forehead. 289

Q. And what were they like? A. A scrape.

Q. And how old were you at the time of your husband's death? A. 40.

Mr. Frank: I think that is all.

Cross examination by Mr. Peet:

Q. Mrs. Johnson, did you sign a permission allowing the autopsy on your husband's body? A. No, sir. 290

Q. Do you know whether one was performed? A. No, I don't.

Q. Didn't anybody tell you that over at the Fordham morgue an autopsy was performed? A. I did not go to the Fordham morgue, my brother-in-law went.

Q. You don't know whether one was performed or not, do you? A. No, I don't, sir.

Mr. Peet: Will you concede that the official records of the City of New York show that an autopsy was performed? 291

Mr. Frank: If you show me that an autopsy was performed. Show it to me and I will see. I know just the opposite.

Mr. Peet: I will get the record.

Mr. Frank: Will you let his Honor look at it and see whether I am right or whether you are right?

Mr. Peet: Surely (handing paper).

The Court: All right. You can have it (returning paper).

Mr. Frank: I will not concede it.

292 By Mr. Peet:

Q. Mrs. Johnson, at the time that your husband died, was your daughter that you have referred to married? A. Yes, sir.

The Court: Do you want to offer any part of that in evidence?

Mr. Peet: No, sir. At least, I would have to look it over, but I don't think so. Mr. Frank would concede that an incision was made in the body.

293 The Court: No, no, he concedes nothing. Do you want to offer any part or all of that in evidence? That is what you can do.

Mr. Peet: No.

The Court: You don't want to offer any part of it?

Mr. Peet: No. May I proceed?

The Court: Yes.

Q. Now, I think you told us, Mrs. Johnson, that your husband had never, while you were married to him, been in the hospital or had any serious illness. A. No, he

294 had never been in a hospital.

Q. And he had no serious illness? A. No.

Q. Had he ever been away from his job at the railroad on account of illness? A. No, sir.

Q. Had he ever been away as much as a month from his job with the railroad company? A. No, sir.

Q. Now, might I show you this sheet of paper and ask you if that refreshes your recollection on that point (handing paper)? Does that help to refresh your recollection as to any occasion when Mr. Johnson, your husband, might have been ill? A. He was not really ill, he had a hernia.

Q. And when was that? A. That time stated there.

Q. In 1943? A. Yes. 295

Q. How long was he out with a hernia? A. A few weeks; I don't recollect how many weeks exactly.

Q. He had a hernia operation? A. No, he had no operation.

Q. He was just out with his hernia condition? A. That is right.

Q. Now, later on, in that same year, was he out for any other reason?

Mr. Frank: Is that 1943 you are inquiring about, Mr. Peet?

Mr. Peet: Yes. 296

A. No.

Q. May I show you this slip of paper and ask you if that helps to refresh your recollection on that point? A. That was the same thing, the hernia.

Q. Did your husband have rheumatic arthritis in the summer of 1943? A. No, he never had it.

Q. Was he treated that summer by Dr. Mariano Morvillo? A. Yes, for hernia.

Q. But not for rheumatic arthritis? A. That is right.

Q. Nothing but the hernia? A. That is right. 297

Mr. Peet: Mr. Frank, would you concede that, if called Dr. Mariano Morvillo would testify that he had rheumatic arthritis?

Mr. Frank: Don't ask what he said in there.

The Court: No, no. Call him tomorrow morning if you want to call him. Counsel doesn't have to concede anything. You have a right to subpoena him.

Mr. Peet: Well, that is true, but I don't know him from Adam, Judge. That is all.

298 Re-direct examination by Mr. Frank:

Q. To your knowledge, did he ever have any fainting spells or anything like that? A. No.

Mr. Frank: That is all. I did forget something, your Honor, if you will indulge me on that again.

The Court: All right.

By Mr. Frank:

299 Q. You say Audrey was married? A. Yes.
Q. How old was she at that time? A. 15.
Q. Was the marriage annulled after that? A. Yes.

Mr. Peet: When was it annulled?
The Witness: I don't know just the date; it was recently.

By the Court:

Q. How old was she when it was annulled? A. Just recently.

300 Q. She had it annulled just recently? A. I believe it was because her husband was away.

The Court: That is all.
Mr. Frank: That is all.
Mr. Peet: That is all.
Mr. Frank: I will now call Audrey Johnson.

AUDREY JOHNSON, called as a witness on behalf of the Plaintiff, having been first duly sworn, testified as follows: 301

Direct examination by Mr. Frank:

Q. Audrey, how old are you? A. 20.

Q. When will you be 21? A. May 28th.

Q. I can't hear you. Don't be nervous. It will only take you a little while. A. May 28th.

Q. You were married when you were 15? A. That is right.

Q. How long did you live with your husband? A. Two months. 302

Q. Two months? A. Yes.

Q. At the time of your father's death, were you living at home? A. Yes, I was.

Q. And when was the marriage anulled? A. Well, I have given it to the lawyer.

Q. How long ago did you give it to the lawyer? A. Well, I waited because my husband was in prison. I didn't want it while he was in prison.

By the Court:

Q. All right, forget that. Was it annulled recently? 303
A. Yes.

By Mr. Frank:

Q. Just one more question. Were you with your mother at the undertaking establishment? A. Yes, I was.

Q. Did you notice any marks on your father? A. Yes, I did.

Q. Will you tell us where they were? A. On his forehead.

304 Mr. Frank: That is all.

Mr. Peet: No questions.

The Court: That is all.

Mr. Frank: May I read into the record the American Experience Tables?

The Court: Yes.

Mr. Frank: At the age 41, the American Experience Tables show the expectancy is 27.45.

The plaintiff rests.

Mr. Peet: I move at this time to dismiss the complaint on the ground that the plaintiff has
305 failed to prove any negligence on the part of the defendant, the New York, New Haven & Hartford Railroad Company, has failed to make out a prima facie case, has failed to put in sufficient proof to avoid the dismissal of the complaint at this stage.

The Court: Mr. Frank, as I look at the case, all I can see that I can send to the jury—you have not proven any active negligence—all I can see that I can send to the jury at the present time is whether or not this Captain O'Brien operated those lighters in accordance with the custom and prac-
306 tice testified by your expert man. Outside of that, what else can I send to the jury? Now, what piece of negligence may I charge on?

Mr. Frank: May I answer you now on that?

The Court: Yes.

Mr. Frank: As testified by the expert, and also as testified to by the captain, it was his obligation to see that the men were on the float, when he heard the voice he didn't recognize to be that of Johnson, he should have made sure, and he testified further that bridgemen are there and he

couldn't tell whether the bridgemen gave the signal 307
of "all gone" or whether this man Johnson gave it, and, under the circumstances, it is a question for the jury to determine whether he acted reasonably under all the circumstances in pulling out of the slip. That is No. 1.

No. 2: I also respectfully suggest——

The Court: Stop right there.

Mr. Frank: He got the "all gone" signal——

The Court: He was your witness.

Mr. Frank: I am fully conscious of that.

The Court: You are fully bound by his answers to a certain extent. 308

Mr. Frank: No, I am not.

The Court: Oh, yes, you are. If you aren't, then I don't know any law. You have some leeway but where you have a witness you vouch for his honesty, and I let you have leeway in eliciting his answers from questions, but he testified that for nine years, or 19 years, he did this work the same way, that he got a signal "all gone" or "all clear," and he testified that he didn't see any bridgeman there at all, that he pulled out when the signal was given "all gone," that there were no lines 309
holding fast, that he saw that the lines had all been released, and there was no jerk of the boat, which indicated that there wasn't any line that wasn't released, and, therefore, I don't see any negligence there at all, I don't see any negligence on that feature of the case at all.

He did the work as he customarily did it for 19 years, and I am not going to say whether he recognized the voice or not was negligence, because I couldn't recognize a voice from the back of the courtroom, and I don't think anybody else can. In work like that you have a custom and practice.

310 Nobody knows how he got overboard or why he did go overboard.

All I know is that he got the "all gone" signal, and that is in your part of the case, that he proceeded a hundred feet slowly in pursuance of that "all gone" signal, that no lines held, and he testified further that the lines had been released, and that he couldn't see Johnson because of that piece of rack that was there.

Now, all I think I can send to the jury, if I can send anything at all, is the expert's testimony that he left that pier before seeing that his man
311 was safely on board; that is all I can give to the jury. That is my conclusion at the moment.

Mr. Frank: After all, I certainly am not taking any exception or anything like that.

The Court: I don't think that is an item of negligence. Will you look at this case? Have you got this case, this Colonna case?

Mr. Frank: Colonna?

The Court: Yes; will you look at it overnight? Colonna v. Merchants & Miners Transportation Company, 112 Fed. (2) at page 612.

312 Mr. Frank: I will read that.

The Court: I think that case is more nearly like your case than any case I have been able to discover with the exception that you have the added feature that they haven't in this case, the expert testimony. We worked here last night and we found that. Will you look over it, Mr. Frank?

Mr. Frank: I will look at it. I have a vague recollection of the case.

The Court: I would lend you the book if I were sure you would bring it back.

Mr. Frank: May I say this: I take it that your Honor is not going to submit it now.

The Court: No; suppose we leave everything open until tomorrow morning. Are you through with your proof? 313

Mr. Peet: I have just one witness.

The Court: Then I will reserve decision on the motion. Put your witness on. I am sorry, I thought you had no witnesses.

Theodore E. DeMars, called as a witness on behalf of the defendant, having been first duly sworn, testified as follows: 314

Direct examination by Mr. Peet:

Q. Now, where do you live, Captain? A. East Orange, New Jersey.

Q. What is your present occupation? A. Marine surveyor and appraiser.

Q. Do you hold a master's license? A. Master's and pilot's license of unlimited tonnage.

Q. How long have you held that license? A. For the past 34 or 35 years.

Q. Now, what has been your operating experience in New York with carfloats and tugs, Captain? A. I was employed in 1910 to 1920 with the Pennsylvania Railroad, handling carfloats and barges in the various parts of the harbor. And I have operated on the Atlantic Coast. As you refer to the New York harbor, I have had considerable experience in all types of towing in New York harbor, flotilla tows, docking ships, schooners, barges, lighters, dredges, and dump scows. 315

By the Court:

Q. Up to what year? A. 1920.

316 By Mr. Peet:

Q. And have you, since that time, from time to time gone over to the Pennsylvania float bridges and watched them operate? A. I have on various occasions gone aboard tugs in the Pennsylvania and the Lehigh Valley Railroad, where I have shipmates and acquaintances, and often spent time on board with them and may even have been permitted to handle the boat.

By the Court:

317 Q. You are an appraiser now? A. That is right.

Q. You inspect damage to certain boats? A. That is part of our duty, and estimate repairs and damages.

Q. That carries you all over the harbor, does it? A. All over the Atlantic Coast.

Q. Where you see all these flotillas of barges and boats? A. Yes.

Q. You are very active, are you? A. I am, sir.

Q. And you have seen the Pennsylvania and different railroads operate with lighters? A. That is right.

318 The Court: All right, go ahead.

By Mr. Peet:

Q. Now, Captain, I want you to assume that carfloat "53" of the New Haven Railroad was lying in float bridge No. 11 at Oak Point, and that carfloat "No. 58" of the New Haven Railroad was lying in the float bridge No. 12 at Oak Point, and that each of these carfloats were at that time lying with the bow end in and lying light, that is, with no railroad cars aboard with about a five-foot freeboard, and that each was about 340 feet long and 30 feet wide, and that the tug "Transfer 10" of the New Haven

Railroad was lying aft on the port quarter of the carfloat "No. 53" with its bow in to the carfloat, and that the two carfloats at the bow end were separated by a pin or rack which was about 40 to 60 feet long, and that the starboard side of the carfloat "No. 53", of carfloat "53", was adjacent to the port side of the carfloat "No. 58", and that the captain was in the pilot house of the tug "Transfer No. 10", and that, in that pilot house, which was surrounded by windows of glass, he couldn't see the bow for about 40 to 60 feet of carfloat "58" in the place where the rackline from the rack or pin dividing the carfloats was secured to that carfloat "58", and that, after the lines securing the carfloats to the rack, the long rack and the short rack there, had been released and unloosened, and the captain could see this all except this one line which he couldn't see, that he then heard a signal "all gone" from that direction, that he couldn't definitely identify the voice of the man who gave the "all gone" signal, that it was the duty of his floatman at that time to be up there to give that signal and to release that rackline leading from the short rack to the carfloat "58", and that it was the duty of that floatman to stay there until after the carfloat had been pulled out of the rack, so that he could tie a cross line between the two bows of the carfloats, and that the only other deck force was a first deckhand or mate, who was at that time holding the line, the bow line of the tug, in his hands and standing on carfloat "53" next to the bow of the tug, and that the only other hand was a second deckhand tending lines at the bow of the tug, and that, after receiving or hearing this "all gone" signal, the captain sounded his slip whistle. 319 320 321

Now, Captain, could you tell us, or, is it your opinion with reasonable certainty that under such circumstances it was reasonably safe and proper and seamanlike for the captain to start pulling out?

322 Mr. Frank: I object to the latter part of the question.

The Court: Yes.

Mr. Peet: Could you tell us, assuming all those facts, whether it was common custom and procedure in New York harbor at that time, under those circumstances, then to pull those carfloats out of the float docks?

The Witness: Yes, that was common procedure.

Q. And was that the procedure used on the Pennsylvania Railroad? A. It is the procedure used by all railroads
323 when pulling two carfloats out of two different bridges adjacent to each other.

Q. And there was no custom or practice that you know of that would require the captain to send a man out there to identify whose voice it was he heard, is there? A. Not on an empty carfloat, no.

Q. Now, Captain, would you assume further, in addition to all the facts that I have already given you, that, after the carfloats were pulled past the center pin or rack in the usual fashion, and they were being maneuvered preparatory to being towed 500 feet upstream to be docked
324 broadside at the pier at Church E. Gates, the captain, for the first time, noticed that the floatman, whom he had expected to see up in the bow on the port side of carfloat "58", was not there, and would you further assume that this move could be made without the aid of the floatman, and that the tug was planning to take the carfloat to pier 3 of the Church E. Gates place, and then to go down light to a place 600 feet downstream from bridge 12, to a place known as the Hole, and that, while moving out of 11 and 12, the captain heard no splash, heard no calls for help or any calls, saw no splash, and the man was known to be a good swimmer, and that a person could get out of the water up these steps to the float bridges or walk to the

shore, and that the captain had no knowledge that his floatman was in any danger or injured, that it would take longer for him to dock the floats back in 11 and 12 bridges than to carry out his move and come back light. 325

Can you tell us whether, under all those circumstances, there is any common custom or practice in New York harbor for the captain under those circumstances to tie up the carfloats to the nearby rack or to turn them loose in the ebbing tide to go in to see if he could see the floatman? A. That is rather a lengthy question. You ask in that question, in one instance, could the operation be done without the aid of the floatman.

Q. I said, "assume that the operation could be done without the aid of a floatman." A. Oh, I see. No, there is no custom. That would come under an emergency, such a maneuver. If nothing happens, you say, "assume it had happened," but there is no reason to assume that anything has happened. The fact that the floatman is not on the float isn't a surprising incident, because—— 326

Mr. Frank: No, not because.
Mr. Peet: Please, this is an expert's testimony.
The Court: I will let him answer.
Mr. Frank: All right. 327

A. (Continuing) The movement is a short one, from bridges 11 and 12 to Pier 3, Church E. Gates. It doesn't require three men, a floatman and two deckhands, to complete that maneuver. It is not unusual on such a short maneuver for a floatman, when he lets his line go, to jump ashore. That is, of course, where a boat is working in the immediate vicinity. If these floats were going to Greenville or to Jersey City, and the fellow wasn't on the float, you would say, "Hey, we can't go without him," but, maneuvering back and forth in what we call slip service, that is different. We assume he jumped on the dock and

328 knew he would be back in ten or fifteen minutes just to push them over broadside.

Q. Is it a matter for the captain's judgment to determine what to do? A. He is master of the vessel, he is in charge.

Q. There is no custom or practice to determine what he has to do in that particular type of situation, is there? A. There is not.

Cross examination by Mr. Frank:

Q. Captain DeMars, as I understand it, your work as a master of harbor craft has been up to 1920. Am I
329 correct? A. Yes.

Q. So that, for 31 years, you have been doing what? This is 1951. A. Well, I have been engaged in the marine business.

Q. As what? A. Ship surveyor and appraiser.

Q. And acting as an expert from time to time? A. Oh, we do a lot of things.

Q. Do you act as an expert? A. Yes.

By the Court:

Q. Do you get paid as an expert? A. Yes.

330 Q. You will get paid for your work today, won't you? A. I will submit a bill. I have an office at 115 John Street.

Mr. Frank: I just want to get the background, please. You say you have an office at that address?

The Witness: Yes.

Q. Did you ever testify for the New Haven Railroad?

The Court: He has testified for everybody around here for a long time.

A. I don't recall if I did offhand. I think, yes, I think I 331
testified once before.

Q. You did? A. Yes.

By the Court:

Q. If you were able to do so, you would do it for anybody that called you, wouldn't you? A. Yes, surely.

Q. You say you would? A. Yes, surely.

The Court: He has been around here for 20 years, I know.

Mr. Frank: I have not had the pleasure of seeing 332
him before.

By the Court:

Q. You have been all over this harbor from stem to stern for 20 years or more, haven't you? A. 31 years, the 17th of this month.

Q. And you have been examining vessels to see how they operate so as to be an expert in any kind of a case, is that right? A. Yes.

By Mr. Frank: 333

Q. Let me ask you this: The purpose of the "all gone" signal that the captain waits for is to find out whether a line is gone, is that right? A. Well, it is for the purpose of knowing if he can make a movement of the boat. It means that the last line is cast off, the lines are all gone.

Q. And I take it, when the man that is handling the line, who says "all gone," after he has gotten rid of the lines, he says "all gone," isn't that the usual custom? A. Well, that could be. It varies. Oftentimes, a fellow that is more agile will let the line go and yell "all gone," and

334 still have to throw it up on the dock, and another fellow might untie the line, throw it up on the dock, and then say "all gone;" you understand, he pauses.

Q. The purpose, essentially, is to notify the captain of that particular line, that it is cast off, isn't it? A. That is right, that the boat is free.

Q. And you are acquainted with Oak Point? A. Generally, yes.

Q. What do you mean by "generally"? When were you there last? A. Oh, I was there six months ago.

Q. For what purpose, surveying? A. No, I was up
335 there looking at some equipment, some dredging machinery equipment, adjacent to Oak Point bridges.

Q. Did you happen to remember what bridges you were on? Was it 11 and 12? A. No, actually I wasn't.

Q. But you know of the system of short rack lines and long rack lines? A. That is right.

Q. You know that the long rack lines are taken off by the bridgemen? A. No, that is the line at the apron.

Q. I am talking about the long racks. Do you know what the long rack is? A. I know there is a rack between the bridges that separates the floats from one another, separates one float from another in there.

336 By the Court:

Q. Was there a long rack there too? A. I don't know. I never measured it.

Mr. Frank: Will your Honor indulge me a moment?

The Court: Surely.

By Mr. Frank:

Q. Do you distinguish between the long rack and the short rack? A. If there is a long rack there, it is there.

Q. But the lines of the long rack are thrown off by the bridgeman? A. That, I don't know. 337

Q. Were you here yesterday when the first mate testified? A. No, I didn't come in until ten minutes to 1 today.

Q. Was that while Captain O'Brien was on the stand? A. No; Captain Holmes.

Q. Were you here when Captain O'Brien was on the stand? A. Only for the few minutes when he was back for you to ask some questions.

Q. Now, of course, if a bridgeman throws a line off, he hollers "all gone," is that right? A. Every line has to be accounted for. 338

Q. He could, couldn't he? A. Well, he could. There is no law against shouting, but I wouldn't expect him to give the shout because the man on the boat gives the shout.

Q. But, if the purpose is to indicate that a line is gone, isn't it the usual thing, from the time that you did work on these tugs, when the bridgeman throws off his line for him to call the signals? A. No, he doesn't signal until the last line is gone. You must remember this, there are more than one line. You know that, don't you?

Q. I understand that you disagree with the testimony in this case that when the bridgeman yells "all gone," he lets go? 339

The Court: He didn't say that.

Mr. Frank: I am willing to leave that to the record.

The Court: No, I am going to tell the jury that the record doesn't show that the bridgeman said the line is "all gone." The mate said he didn't know who said "all gone."

Mr. Frank: No, I said that when a bridgeman lets a line go, he does this.

340 By the Court:

Q. "All gone" means, Captain DeMars, that all lines are free, is that right? A. Yes, that the last line has been let go.

Q. And nobody is supposed to say "all gone," no matter who he is, until that lighter is absolutely free of all lines? A. Until the last line is free; that is the fellow that usually shouts, the fellow that lets the last line go, when all the lines are gone.

By Mr. Frank:

341

Q. Tell me this: I noticed, when my friend asked you a hypothetical question, you interspersed with this observation:——

Do you remember when he asked you whether it wasn't a fact that it is not necessary to send a man out to see if you don't recognize the voice, to see whether the man who said "all gone," was the floatman, and you said, "Not on an empty carfloat." Do you remember when you said that? A. Yes.

Q. When you said "not on an empty carfloat," when you interspersed that, when did you mean by that? A. Well,

342 on an empty carfloat, the deck is flat and clear.

Q. To everybody? A. To everybody.

Q. Oh, and otherwise? A. When the carfloat is loaded, it has the freight cars on it and they extend approximately 13 feet above the deck of the carfloat, so the man couldn't see who was standing on the deck of the carfloat.

Q. So, then, what do you do about it? A. I do nothing about it. Do you want to move the cars?

Q. Just a moment, Captain. You said, when Mr. Peet asked you whether it is necessary to send a man out to check as to whether the floatman called "all gone," if you

didn't recognize that voice, that is you didn't know who shouted "all gone," you said it is not necessary, but you said "not on an empty carfloat." Do you remember saying that? A. Yes, I remember saying that. 343

Q. Now, I want to know why you emphasize "not on an empty carfloat." A. Well, if you would have that part read——

Q. Unless the Court directs it, I think you and I will agree that when my friend asked you whether or not it is customary and necessary to check when you don't recognize the voice of your floatman, whether or not it is necessary to send a man out, you said, "not on an empty carfloat." You remember that, don't you? A. Yes, I remember that, referring to an empty carfloat. 344

Q. Now, the reason you said "not on an empty carfloat" is why? What is the point of saying that? A. Because there is clear vision on an empty carfloat. That is my point.

Q. I understand that, that it is your point, but I want to have your testimony. Now, if there is not clear vision, what about it? A. I am asking you: What about it? Do you think that every operation on a boat has clear vision? It is not like driving an automobile.

Q. Captain, I still want to know why you distinguish between an empty carfloat and a carfloat that has freight cars on it. It is a question of vision, isn't it? A. It is a question of vision, to see whether—who is standing on it, on deck. 345

Q. To see who is standing on deck? A. To see who is standing on deck, yes.

Q. Why is that so important? It is because you want to see, isn't it? A. I don't want to see; I want to hear. I don't care who it was if I understand what he said. I don't care who told me, who said the boat was all clear.

Q. Then it doesn't make any difference whether it is empty or not? A. Wait; let us not confuse the issue.

346 I say this: I can see over the entire deck of a carfloat if it is not loaded.

Q. And if you don't see? A. And if it is loaded, I can't see over the whole carfloat.

Q. What difference does it make if you can't see? A. It doesn't make any difference to me, not to me.

Q. So, why did you emphasize, "not on an empty carfloat"? What did you mean by that? A. Well, it is not connected with the wording of his hypothetical question.

Q. I will tell you what his hypothetical question was without going through the entire thing. A. Go ahead.

347 Q. The important thing was whether or not, if a man's view is blocked up, and he hears the signal "all gone," and I think I am repeating it pretty much verbatim, whether or not it is necessary to send a man over to check whether the floatman is on or not, and you said, and I wrote down the words, "not on an empty carfloat."

Mr. Peet: I object to the recapitulation.

By the Court:

Q. The minute he gets by the 40-foot rack, he can see the whole deck? A. That is right.

348 Q. Whereas, if there are cars on it, he cannot see? A. Right.

Q. When there are cars on a float, don't you have an extra crew? A. No.

Q. You don't? A. No, one floatman and two deckhands, that is all.

The Court: All right, go ahead.

By Mr. Frank:

Q. Let me ask you something else. Where there are, or when there are cars on there, your vision is obstructed; that is right, isn't it? A. That is right.

Q. Just like, at a certain time, this rack, the short rack, 349
obstructed the captain's vision so he couldn't see the bow, the port bow, of "No. 58." A. "58?"

Q. Yes, "58." Is that right? A. That is right.

Q. So, therefore, then, my friend asked you whether, then, you have to rely on audible signs, is that right? A. Yes.

Q. And the signal is "all gone"? Is that correct? A. Yes, that is right.

Q. Now, the cars on the float are as much of an obstruction to the captain as the captain's vision in this case was obstructed by the short rack? A. I would say it is 350
greater.

Q. It is greater; the cars are an even greater obstruction? A. Yes.

Q. So, I want you to tell the jury now, what you meant when you were asked by him as to whether or not it is necessary to send a man back, and your answer was, "not on an empty carfloat"? A. What do you want me to tell the jury?

Q. I want you to tell me, or the jury, what did you mean when you emphasized that it is not necessary "on an empty carfloat." Will you tell me what you meant by that? A. I meant that it is not necessary at any time, light or 351
loaded, to send a man over to identify who spoke what. That is the most ridiculous thing I ever heard of.

Q. Are you through? A. I am, sir.

Q. You are an experienced expert, and you know how to use language. A. I am an experienced mariner.

Q. And you have testified, as I understand it, a good many times? A. I have.

Q. All right. Now, when you emphasize "not on an empty carfloat," there was something on your mind. A. Only that he was speaking of obstructions. That is what was on my mind. I think I interjected that in there.

352 I was trying to follow his question because, if you recall, it was a very lengthy hypothetical question.

Mr. Frank: I think that is all, my friend.

Mr. Peet: That is all.

Mr. Frank: My associate tells me that I forgot something. With the Court's indulgence, may I proceed?

The Court: Go ahead.

Mr. Frank: That is all.

Mr. Peet: If your Honor please, I don't know about this Dr. Morvillo, where he is, or who he is.
353 I rest except for him.

The Court: I will give you until tomorrow morning, and you can rest then.

Mr. Frank: I wasn't paying any attention.

The Court: If he wants to try to produce this Doctor, I will give him a chance. You don't have to close your case until tomorrow morning. However, I won't give you longer.

Then we will recess until 10 o'clock tomorrow morning.

(Adjourned to Thursday, April 12, 1951, at
354 10:30 a. m.)

Brooklyn, New York,
April 12, 1951. 355

Appearances:

(As heretofore noted.)

TRIAL CONTINUED

Mr. Peet: If your Honor please, may I recall Mrs. Johnson for questioning?

The Court: Mrs. Johnson?

Mr. Peet: Yes.

The Court: All right. 356

MARGARET JOHNSON, recalled, testified further as follows:

By Mr. Peet:

Q. Mrs. Johnson, I show you this sheet of paper. Is that in your handwriting? A. No, sir.

Q. Is that your signature? A. No, sir.

Q. Is that in your husband's handwriting? A. No, sir.

Q. And you never saw that paper before? A. Yes, I did. 357

Q. Did you see it in 1943? A. Yes, I was there when it was written.

Q. And it was written in 1943? A. That is right.

Q. Who wrote it? A. My sister.

Q. Is her name Margaret Johnson? A. That is right.

Q. And what is your name? A. Margaret Johnson.

Q. What is your sister's marriage name? A. Mrs. Hops.

Q. Do you recognize her handwriting? A. Yes.

Q. Would you read that paper over, please? Is the information in that paper true and correct? A. No, it is not.

Q. Is any part of it true and correct? A. No.

358 Q. Did you tell your sister to write those words on that paper? A. No, I didn't tell her; my husband did.

Q. Your husband did? A. That is right.

Q. And after he told her to write that, she wrote it, is that right? A. That is right.

Mr. Peet: I offer that in evidence.

Mr. Frank: May I see it?

I have no objection.

(Letter dated May 31, 1943 marked Defendant's Exhibit C in evidence.)

359

Mr. Peet: May I read it to the jury?

The Court: Yes.

Mr. Frank: Show the date.

Mr. Peet (Reading): "2371 Second Avenue, New York City, May 31, 1943.

Dear Sir:—

I would like to inform you that my husband has not been feeling well for several weeks and has been complaining of his stomach and through his ailment

360 he had to visit a doctor who advised him to rest up for several weeks so he went up to my sister's place in the mountains.

I will write you to let you know how he is getting along and how soon he will be able to report to work. I remain,

Yours sincerely,

MARGARET JOHNSON."

By Mr. Peet:

Q. Now, Mrs. Johnson, was your husband out sick from work for about a month in the fall of 1944? A. '44?

Q. '44. A. I don't recall in '44. 361

Q. Have you remarried? A. No, sir.

Q. Did your husband ever have rheumatic arthritis? A. No, sir.

Q. Did he ever have stomach trouble? A. Only the hernia that he had.

Mr. Peet: That is all.

Mr. Frank: That is all.

The Court: Step down.

362

DAVID RUPP, called as a witness on behalf of the defendant, having been first duly sworn, testified as follows:

Direct examination by Mr. Peet:

Q. Where do you live, Mr. Rupp? A. I live in the Bronx.

Q. And whom are you employed by? A. The New York, New Haven Marine Department.

Q. What is your position in that department? A. Chief crew dispatcher.

Q. How long have you held that position? A. Over 29 363 years; I have been there 30 years.

Q. Now, as chief crew dispatcher, what is your job in connection with the men under you? A. To dispatch crews.

Q. And you are talking about marine crews? A. Marine crews, yes.

Q. These crews that handle tugs and carfloats? A. Yes, tugs and carfloats.

Q. And that is crews of the tug "Transfer 10", back in 1946? A. Yes.

Q. Now, under your supervision, are records kept of

364 the days men in the Marine Department who were on these tugs work? A. Yes, sir.

Q. And it is in the regular course of the business, the company's business, to keep such records? A. Yes.

Q. And do they regularly keep them? A. Yes, sir.

Q. Have you examined those records for the years 1943, 1944, and 1945? A. I have.

Q. And have you looked in those records for those three years to see the days when Mr. Johnson, the man involved in this case, was called for work but did not work? A. Yes.

365 Q. Now, would you tell us what those days were?

Mr. Frank: Well, has he got the records?

Mr. Peet: Yes, the records are here, but they are in four books, there are four books.

The Court: Give him the records.

Mr. Frank: I would like to look at something.

The Court: Give him the records.

Mr. Frank: I would like to know what he relies on.

The Court: Is that the '43 book?

Mr. Peet: Yes, sir.

366 The Court: Give the witness this '43 book.

By the Court:

Q. Can you tell from those books what days in 1943 he did not work? Look at the book. A. Yes.

Q. Now, the answer is yes or no. A. Yes.

Q. Let us see. You have already looked at the book, is that right? A. Yes, sir.

Q. You know what days he didn't work? A. Yes, and I have a record here.

Q. No, I want it from the books. You look at the book and tell us what days in 1943 he didn't work, not from the

sheet. You can use your sheet to direct yourself to what page in the book. 367

Mr. Frank: May I just ask whether those pages are numbered?

Q. Are the pages numbered? A. The pages are not numbered, but they are by name.

Mr. Frank: Alphabetically?

The Witness: By names, deckhands and so on.

Mr. Frank: That is all right.

868

By the Court:

Q. Go ahead, now. A. January, 1943: 2nd and 3rd he was called, but he was out, not available.

Mr. Frank: The 2nd and 3rd.

A. (Continuing) And he worked through the rest of the month.

Q. He was out the rest of the month? A. No, he worked the rest of the month.

Q. Now, when was the next time he was out? A. February 8th. 369

Q. February 8th? A. Yes, and the 9th and 11th.

Q. 9th and 11th. When else in February?

Mr. Frank: I can't hear him, your Honor.

The Court: February 8th, 9th and 11th, he said.

A. (Continuing) 18th, 20th, 23rd, and 24th.

Q. He was out? A. Yes.

Q. All right, go right ahead. A. In March, the 2nd he was out, and the 9th he was out, the 13th he was out, the 23rd, 24th, and 25th out, he was signed up for a job

370 on the 27th, but he booked off sick, and he was out on the 29th and out on the 31st.

In April, the 2nd he was out, the 6th he was out, on the 7th he was signed up for a job and failed to show up.

The 8th he didn't work, he wasn't available; the 16th not available, the 21st and 22nd, called and out; we called him and he was out.

The 24th he was out. The 28th he was out, and the rest of the month he worked.

In May, we called him on the 5th and he was out, the 9th and 10th, he was out, and the 14th and 15th out. He worked on the 16th, and then he was out the rest of
371 the month, the 17th to the end of the month.

On the 1st of June he reported sick till further notice, and didn't work any time that month.

July, sick the entire month.

August, he was sick until the 14th when he went to work and worked three days and was signed up on a job for the 17th and failed to show up. On the 18th he was off, and then he was assigned to a steady job on the 20th. He worked through the rest of the month, from the 20th of August for the rest of the month and he lost no more time.

372 He worked until the 6th and reported off in September on this same steady job. Then he was displaced by a man his senior on the 9th, and he took a floatman's job on the same boat, and he worked until the 17th and reported sick for one day, and then worked the rest of the month out. He worked all October except the 17th.

He worked all of November except the 17th.

He worked until the 16th and was absent on the 17th.

Mr. Frank: Of what month?

A. (Continuing) He didn't work on the 18th, 19th, or 20th. On the 20th he reported sick until further notice.

By Mr. Peet: 373

Q. What month was that, Mr. Rupp? A. December.

Mr. Frank: December?
The Witness: Yes, December.

Q. Was he off the rest of that month sick, Mr. Rupp? A. What is that, sir.
Q. He was off the rest of December sick, wasn't he?

Mr. Frank: Look at the book. 374

A. Yes.
Q. Now, that is the book for 1944 that I show you now. Does that contain the work records, Mr. Rupp? Is that the book for 1944, Mr. Rupp? A. Yes, sir.

By the Court:

Q. All right, go ahead. A. January, 1944, he was holding a steady job on "No. 12"; "21" was replacing "12" at the time. He lost the 1st.

By Mr. Peet: 375

Q. That was January what? A. January 1st.
Q. All right.

Mr. Frank: What?
The Witness: January 1st.

Q. He was back at work? A. He didn't work January 1st.
Q. He didn't work? A. No.
He went on his vacation on the 10th for one week. He

377 returned on the 16th, and worked every day for the rest of the month.

In February he failed to show up on the 5th. He reported off on the 10th, and didn't show up on the 12th, he reported off on the 20th, he failed to show up on the 28th, on the 29th also, of February, that is.

In March, he reported off on the 2nd, the 7th, the 10th, and the 11th, and he reported sick on the 18th, and worked the rest of the month.

In April, he reported off on the 1st, he was absent on the 5th, he reported off on the 7th and the 14th he reported off; the 21st he reported off; and he reported off
376 on the 23rd, 24th, 25th, 26th, and 27th, and he worked the rest of the month.

In May, he worked the 1st and 2nd, the 3rd and 4th, and was absent on the 5th, and he reported off on the 9th, and then he was displaced from that position by a man his senior. He bid into a job in the same month, in May, on "Transfer No. 19", "11" taking her place at the time, and he worked from the 11th to the 16th and asked to be excused for the 17th, and he worked through the rest of the month.

He worked on that same job in June and reported off
378 on the 5th and on the 13th, and then he gave up the job on the 16th; the 16th was his last day, the beginning of the 17th, and he bid for another job on the 21st, bid for another job on "21", and worked from the 17th to the end of the month with no time off.

Mr. Frank: Does that mean that he got that job that he bid for, Mr. Rupp? Is that what you mean?

The Witness: Yes, sir, that is right.

A. (Continuing) He failed to report on the 1st of July, he worked on the 2nd, and reported off on the 3rd. Then

they abolished the crew, and he worked extra from then on, the rest of the month, but he was called on the 16th and was out, he refused a job on the 17th, and, at that time, we couldn't get him on the telephone, and he didn't call us until the 27th, but he called too late to get the job, so he didn't work that day. 379

Mr. Frank: Is that in July, that you are at, July, Mr. Rupp? Is that July? I don't want to wait until cross-examination. I hate to go back.

By the Court:

Q. Is this July, 1944? A. That is right. 380

Mr. Frank: I thought you said he worked the rest of the month.

Mr. Peet: When he became an extra.

Mr. Frank: I don't want to go back over this.

The Court: Proceed. You can cross-examine him on that.

Mr. Frank: All right.

The Court: Go ahead from July. We have to get through with this. You are in July, 1944. Are you through with July, 1944? 381

The Witness: Yes.

The Court: Go to August. You have got your notes there. You made notes from this book?

The Witness: I did, yes, sir.

The Court: You took the notes from the book?

The Witness: Yes.

The Court: Then read your notes.

Mr. Frank: Read them.

A. (Continuing) August he was on the extra list, and he lost six days, called and not available.

382 In September, he lost six days, not available.

In October, nine days he wasn't available for work, and on the 24th he reported sick until further notice, and he was still sick all of November and all of December, up until the 18th, that is the 8th, rather.

By the Court:

Q. The 8th of December? A. Yes; and he worked every day from then on in December except the 18th and the 26th, where he wasn't available.

Q. Now, go to January, 1945. A. He was working extra
383 in January, 1945, and he wasn't available the 6th and 24th.

Q. February? A. In February he lost four days not being available when he was called.

Q. March? A. Seven days he lost not being available.

Q. April? A. Nine days lost in April, not available.

Q. May? A. Seven days in May, for the same reason.

Q. Go right ahead. A. June, three days; July, seven days; August, two days; September, seven days; October, five days; November, 11 days, and December, two days.

Q. Go to '46 now.

384 Mr. Peet: He hadn't gotten that far.

A. I didn't take any notes from the '46 book.

Mr. Frank: That is all right. I don't care about that. May I cross-examine him?

Mr. Peet: Yes.

Cross examination by Mr. Frank:

Q. Mr. Rupp, make sure that you hear me. Do you hear me now? A. Yes.

Q. First, let me ask you this: How many days a week

do these crews operate? A. Six days was the regular work week. 385

Q. Six days was the regular work week? A. Yes.

Q. And you talked about a steady job, I notice, at the very beginning, Mr. Rupp, while it was still 1943, he got a steady job. A. No, it was in 1943.

Q. Yes, 1943, in August, he got a steady job. What do you mean by that? A. A steady assignment through a bid. Jobs go up for bids and he won his bid.

Q. I understand. Otherwise, he is what, a replacement? A. A spare man on the extra list.

Q. In other words, he is a spare man, Mr. Rupp, and you call on these spare men when one of the steady men fails to report, is that right? A. For replacement or for filling in crews. 386

Q. That is when a steady man fails to report for any reason whatsoever, illness, and so forth, isn't that right? A. Yes.

Q. Then, for a while, those men get steady jobs? A. If they bid for it and win the bid.

Q. And I notice that you said something, that he got a steady job, and then was displaced by a man his senior? A. Yes, he was displaced by a man his senior, yes.

Q. You mean that his steady job would only last until a man senior in employment would be available? A. If that man is senior and he lost his job, there is abolishment of a crew, or something like that; otherwise he couldn't touch him. 387

Q. But even a steady job held by a junior in length of time may be lost when a senior's crew is abolished, is that the idea? A. Yes.

Q. Now, these replacement jobs that you have looked at, a man that is on replacement, on the average, from your experience of 29 years, how many days work does he usually get a week over the year?

388 Mr. Peet: I think that is immaterial, and I object to that.

The Court: No, let him answer it.

A. During the war, we were very busy all the time, there was work for everybody.

Q. I see. And now?

By the Court:

Q. Let me ask you this, Mr. Rupp: I don't quite understand this. You have read off the record that he re-
389 ported sick at various times. What kind of a record have you got in the book which indicates that? A. It is marked "sick".

Q. Whoever made the record got some information about that? A. That is right.

Q. And, as a result of that information, marked the book "sick"? A. That is right.

Mr. Frank: What was that? I didn't get the last two questions.

The Court: I wanted to know how the sick record got in, and he said somebody made the
390 record from information somebody got and, in the book, he noted "sick."

By Mr. Frank:

Q. Now, Mr. Rupp, following up the Court's inquiry, let us take January of 1943. Let us get to Johnson there. What is there to indicate that Johnson didn't work or was available, or reported sick, or whether there wasn't any particular job at that particular time?

By the Court:

391

Q. January, 1943. Was there work for everybody in 1943? A. Yes.

Q. There was a shortage of labor at that time? A. Yes.

The Court: Now, repeat the question.

(The last question asked by Mr. Frank was read by the Reporter.)

The Witness: There is a zero in the space for the second and third, which means he was called and not at home.

392

Q. You have a little shorthand of your own? A. Yes, sort of a code system. This is vacation, one week.

By Mr. Frank:

Q. That is indicated as vacation? A. Yes.

Q. Now, let me have that a second. In other words, the circle means you called him and he doesn't show up? A. No, he was out, we couldn't get in touch with him, he was not available.

393

Q. I see the idea. You call him up, do you? A. Yes.

Q. These are telephone calls, or are they done by telegram? A. No.

Q. So they are by phone? A. Only by phone.

Q. In other words, you have to get in touch with him by phone? A. Yes.

Q. Now, in the month of January, 1943, just look at, for instance, some other names there, and I want to ask you this: Was the incidence of men being out a great deal during that time?

The Court: No; I exclude that. We are only trying to itemize this man's damage, not somebody

394 else's. The damages in the case depend on how much he worked or he earned, and not upon how much somebody else did work and how much somebody else did earn. You can't compare that.

Mr. Frank: What I wanted to find out is if this is the only purpose of putting these records in, that he wasn't a steady worker.

The Court: Well, it is more than that. It was testified that he was a well and healthy man, and this record shows that he wasn't steady, and the defendant has a right to have this record before the jury.

395

By Mr. Frank:

Q. But, what I want to know is this: A lot of these indications are that you didn't get in touch with him, and he didn't report, is that right? A. Yes.

Q. Wherever there was a real sick leave, it was specially indicated? A. Yes.

Q. But, most of the time—without going through this over and over again, you called him for work and he didn't show up? A. Well, we called him for work, and he was either not at home, or if he took the job, then,

396 of course, he was absent.

Q. I understand. Now, I noticed that, in July of 1944, Mr. Rupp, his crew was abolished. Does that mean that the crew he had been working for, or with, steadily, was eliminated for some reason or another? A. That is right, they discontinued the crew, and the crew had to bid for something else.

Q. Then he becomes an extra man, a replacement, until he bids for a job? A. That is right.

Q. And there, again, he got a job, but he was displaced by his senior? A. That could be.

Q. That occurs again there? A. Yes.

Renewal of Motion to Dismiss Complaint and Motion for Directed Verdict.

Statement by Court.

397

Mr. Frank: I understand that. I think that is all. No further questions.

The Court: That is all.

Mr. Peet: That is all.

Mr. Frank: The plaintiff rests, your Honor.

Mr. Peet: The defendant rests, your Honor.

The Court: All right.

Mr. Peet: If your Honor please, at this time, I renew the earlier motion which I made on behalf of the defendant to dismiss the complaint on the same grounds as alleged earlier, and I also ask, at this time, that the Court direct a verdict in favor of the defendant on the same grounds, the fact that there is no proof of negligence on the part of the railroad company, and that, if anything, the deceased himself was responsible for his own death.

398

The Court: Well, I think I should make a statement in the presence of the jury. I don't ordinarily do this. It is just a brief statement as to just what I am going to submit to them. There is absolutely no proof here, of course, as to what actually happened to this man. Nobody saw it, unfortunately.

399

Now, Mr. Frank urged a point of rescue. I ruled against him on the rescue point, and the reason I ruled against him on the rescue point was that I couldn't see anything in the evidence to indicate that there was a question that I could submit to the jury on the rescue point.

The testimony indicates that this man Johnson had been necessary to do a job on that part of that lighter, which was over 300 feet long, and this Captain O'Brien couldn't see him until they pulled out of the short rack, and that he was under way at that time, and whether

400 he should have stopped or whether he could have stopped, and looked for him, or backed up, or thrown a line to the long rack, and got back, and went back to rescue him, is a question. There is too much speculation in my humble opinion there, and I am not going to let the jury pass on the rescue part of it, and I will rule on that, and that means that you will disregard that and discard that from your deliberations entirely.

On the question of negligence, I am going to submit to the jury just one question, as I indicated to you generally, and I am going to submit to the jury just the one question of fact as to whether or not Captain O'Brien
401 was justified in starting off from that pier 11, or 12, with those two barges in tow, those two lighters in tow, without first seeing whether the deceased was in a place of safety, and, with respect to that, the only evidence that I can submit to the jury on that point is whether or not the expert who testified has shown that there was a custom or practice that no tugboat captain in the port of New York should start up a lighter until he first sees whether his man is in a position of safety, and that is the only question I am going to submit to the jury, and I think, and I hope, you understand that, and that you
402 understand just what I am going to submit to you.

Now, in view of those circumstances, I am going to reserve decision on your motion and let you sum up on that point only. Do you see my point?

Mr. Peet: Yes.

Mr. Frank: Yes.

The Court: Now, how much time do you want to sum up?

Mr. Frank: May I take exception now, for the purpose of the record?

The Court: You don't need an exception. You get it automatically. You both get automatic exceptions

under the rules. I would have told you to put your exception on the record if that weren't so. 403

How much time do you want to sum up?

Mr. Peet: Well, may I have 20 minutes?

The Court: Yes, surely, I will give you 20 minutes.

Mr. Frank: I would like a little more. I wouldn't overdo it.

The Court: All right; suppose we try to get the case summed up before recess, and let the jury go to lunch, and then I will charge the jury.

(Mr. Peet summed up to the jury for the defendant.)

(Mr. Frank summed up to the jury on behalf of the plaintiff.) 404

Charge of the Court.

Abruzzo, *U. S. D. J.*: Ladies and gentlemen, this accident happened on the 22nd day of April, 1946, and Charles Johnson, a floatman, the deceased, who sues through his wife and two children, was an employee of this defendant, The New York, New Haven & Hartford Railroad Company. 405

Now, let me make it very definite that this plaintiff, in your eyes, has a right to be justly treated, and that this defendant, in your eyes, has a right to be justly treated, and your verdict must be based upon the evidence and the law as I dictate it, and we haven't any little people or big people in this Court. I don't recognize this distinction. They are all big, they are all important, and their cause, their defense, their rights are all very important, and that is why I am going to direct you to give this case very deep consideration as to both the evidence and the law, and when you have done that

406 I want you to return a verdict that will justly and squarely square with your own conscience.

Now, the proof in this case is that Johnson was a floatman, and they went into bridges 11 and 12 with this crew to take out two large carfloats that were empty. Of course, the physical facts are very important because, as you see from the pictures and as the testimony indicates, there was a short rack that separated these two long barges, and it was the duty of that man Gaglio, the first witness, to get off the tug and tie together the stern of these two barges. The stern was outside in the
407 river, and the bow was inside to the dock or aprons, or whatever they call them; and it was the duty of Johnson to go up to the front or the bow of the barge and, when these two barges came out from the rack, to tie them and lash them together an' of course, in the performance of his duties, he couldn't tie them until they first passed that short rack, and, before these barges were allowed to leave these aprons or bridges, it was normal in the operation, that all lines that were attached to the short rack or to any other part of the apron would be released, because, necessarily, the tug couldn't pull these lighters out until they were free of all lines, and Gaglio
408 told you what lines he was supposed to release, and he told you what lines Johnson was supposed to release, and there isn't any question that Johnson's duties carried him back to the bow of barge "58", or lighter "58", to first release lines, and then signal that they were released so that the captain could get under way.

Now, the proof further shows that the captain saw all the lines released except the one that was on the short rack, and, if Johnson was at that line, and it is admitted by the photographs and the evidence that the captain couldn't see him, even though it was broad daylight, but the work was done in a customary manner, and the work

that ay was done in the same manner that had been the 409
custom, that is to say, the captain got the word "all gone," which meant all lines were free, and he started to pull out.

Now, there is some question as to whether there was any bridgeman that day. I will leave that entirely to you. I think the evidence is a little bit unclear to you. I don't think anybody definitely said that they saw a bridgeman. I don't know, but that is for you to determine. That may be important and it may not, but the fact is that the captain testified that he heard the "all gone" signal, and then he started to pull the two lighters out, and, when the two lighters got free of that short rack, it was Johnson's 410
duty to tie them, and it was then, for the first time, as Captain O'Brien testified, that he didn't see Johnson, and he determined that he couldn't maneuver the boats around and went on and came back looking for Johnson, and they found him in the water.

Now, ladies and gentlemen, you are not to speculate or guess as to what happened to Johnson on that barge, because you don't know, and you are not allowed to guess at it. You have certain facts that you must consider. You must consider that it was Johnson's duty to be at the bow of that barge. He would have to be at the bow of the 411
barge because, when they got free of the rack, he had to be there to tie it, and he couldn't be anywhere else in the performance of his duties, and that fact is set as much as any fact can be set.

It was the duty of the captain to direct, and he had full control of the operation, and I am going to leave one question of negligence only to you, and it is just as I am telling it to you, and it is this question:

Is there in and around the Port of New York a well known custom that, before Captain O'Brien got under way with his tug, he should have seen or, in some way, known

412 that Johnson was on that lighter in a place of safety, and that is the only question that I am going to permit you to determine. It is as simple as that.

Now, what evidence have you got on that point? You have got to take into consideration all of the evidence that has been testified to and that I have alluded to, and more than I have already gone over, because you have to take into consideration all of the evidence.

Captain Holmes said there was such a well known custom and practice in and around the Port of New York. Captain DeMars said there was not. So you have got to rely on paid expert testimony. Now, when you analyze
413 DeMars' testimony or Holmes' testimony, you have got to be very careful, because it is not the type of testimony that you ordinarily get. It is what we call expert testimony. One side is paying a man for testifying for it, and the other side is paying a man for testifying for it, and, if I were in your place, I would scrutinize it and weigh it very carefully.

Now, Captain Holmes may be entirely truthful. That is up to you to determine. Captain DeMars may be entirely truthful. That is up to you to determine.

But, there cannot be a verdict for the plaintiff in this
414 case, unless you find that there was a well known custom and practice for O'Brien not to leave that pier until he knew in some manner that Johnson was in a safe place. And, in that respect, you have got to use your good common sense and logic.

You have the evidence that, for nine years, this man Johnson apparently had been doing the work as they did it the night this unfortunate accident happened. You have got to take that into consideration, whether there was such a custom and practice. You have got to take into consideration Holmes' experience. Would he notice those things, did he tell you the truth, are you convinced that

he saw this custom and practice going on in the Port of New York repeatedly? 415

Now, a custom and practice, ladies and gentlemen, is not something that you see once in a while. Custom and practice indicates just what the words imply, that a great percentage of the time it is done just that way, and, unless you say that the custom and practice meets that test, and unless you say Holmes' testimony convinces you that it meets that test, you cannot find a verdict for the plaintiff, and the plaintiff's verdict, as I see it, rests entirely upon whether you believe Captain Holmes when he testifies there was that custom and practice that he testified to. 416

Now, counsel has alluded to the fact that Captain O'Brien should have sent Gaglio or the other man to see whether Johnson was in a safe position or not. It is the same thing that I am telling you. It is, or it was, the captain's duty, if there was such a custom and practice to see whether Johnson was safe and, whether he did it through Gaglio or himself, or somebody else, he was to utilize any method that would meet that test.

Now, ladies and gentlemen, the plaintiff has brought this action. I don't make the rules of law, and neither do you. The law says that the plaintiff must prove that the defendant is negligent. 417

I have outlined to you the only item of negligence you can consider. If there wasn't any such custom and practice, if you believe from the evidence that there wasn't any such custom and practice as testified to by Holmes, return a verdict for the defendant.

In determining whether there was such a custom and practice, the law places upon the plaintiff the burden of proving negligence by a fair preponderance of the evidence, and that means that this custom and practice must be proved by a fair preponderance of the evidence. Now,

418 whether you think that is a harsh rule or not, ladies and gentlemen, is immaterial. That is the rule, ladies and gentlemen, that the law imposes upon the plaintiff and it is your duty to follow it. You must determine, when you go into your jury room, whether or not the plaintiff has sustained the burden of proof by a fair preponderance of the evidence, that is, the burden of proving the negligence of Captain O'Brien, that he violated a well known custom and practice in and around the Port of New York, and you must determine that first, if you believe that there was such a well known custom and practice.

419 Now, ladies and gentlemen, it is very important to this plaintiff that she receive a just verdict at your hands. It is very important to the defendant that this corporation receives a just verdict at your hands. So, weigh the evidence carefully, and, if you determine there should be a verdict for the defendant, you stop right there, and you say so.

And, then, if you determine there should be a verdict for the plaintiff, you go to the next item, and that is the question of damage.

The plaintiff is entitled to a verdict, if she is entitled to one at all, under these rules:

420 The laws says that you can only compensate a family for the pecuniary loss sustained, that is, the monetary loss. Well, that sounds cold-blooded, and it is too, but it is the only formula that has been found, and you can see, if you were allowed to pay for love and affection, it would just go into figures that would be fantastic. So the law says that you find out first what the man's business was, how much he earned a year, and here you have that. He earned $1,867.59 in 1943; $2,350.35 in 1944; and $2,719.53 in 1945, and that is a good basis, and a good foundation, for fixing damages because, under the tables he had an expectancy of life of 27 years of life. That doesn't mean,

of course, that a man is going to work 27 years more, but 421
you can utilize that formula as a basis of the determination of damages, and you say to yourselves, "This family has lost a man who earned that much, could have earned it for 27 years more if he was healthy, and he could have earned it for less if he didn't live." I don't know. That is where there has to be some measure of speculation and guess-work. There has to be. You couldn't do it any other way. You have got to take into consideration the work record that you heard. That is important.

He is reported to have been sick; he has reported sick many times. I don't know how important that is. It is 422
important in this respect, and, apparently, from this record, he wasn't a steady worker. Now, whether he wasn't steady because he couldn't work, or because he was sick, is for you to determine. As you know from that record, he reported sick many times. That is important because you have to sort of speculate as to just how much this man would earn each year in the future.

Now, of course, he gave his family $45 a week his widow said, and I have no reason to doubt that, and I don't think you do. On an average, maybe that is what she thinks she got. You can use that as a formula, but you have got to go further, because he took some money out 423
of that each week, and each year, and you have to take out of that what he used each year, and, if he was sick, he had doctor bills and he would use more. You have to consider that.

That sounds kind of cold-blooded too, but that is the way you have to do it, because he is dead, and whatever he would use must be taken out of the sum total that you would give the wife.

So, in measuring the damages, ladies and gentlemen, you award her just and fair compensation for the pecuniary loss that she sustained, based on his earning capa-

424 city for three years and the earning capacity that you determine he would have in the future, and based on how many years you feel he would work in the future, and using the formula I have just told you to use, and then you lump it in one sum, and, when you come back, you will say either a verdict for the defendant or a verdict for the plaintiff in X amount.

Now, I told you at the beginning that I wasn't going to interfere with the questions of fact here. I tried to outline to you as simply as I could what the law is. What you believe the evidence to be is for you, and for you alone, without any interference on my part, ladies 425 and gentlemen, and I assure you I have no opinion one way or the other as to what you should do. I am going to leave you free to utilize your own opinion, and you are the sole judges of the facts in this case. As I told you at the outset, I am the sole judge of the law. Now, you take this case and you take the facts. It is important, first, to determine the factual part of the case. It is important to determine whether the plaintiff is entitled to a verdict or not, and if you find that she is entitled to a verdict, proceed to assess damages, using the formula and your good common sense.

426 Now, ladies and gentlemen, I say this always to a jury: We are very prone to go into a jury room and feel that, because there is a corporation on one side and a plaintiff with a great deal of sympathy on the other side, we ought to kind of make it a little even. Well, now, we are not here for that. I feel very sorry for this widow and her two children. I know you sympathize with her a great deal, and you should, too, but you don't try or decide cases that way. No sympathy is to be allowed to interfere with your judgment, and you are not allowed to say, because The New York, New Haven & Hartford Railroad Company is a corporation, that they

427

can afford to pay. That is not the basis for deciding a case, because, if this were the basis, what would be the sense of having a trial at all?

And, when you measure damages, you are not to be too small about it, or too generous, because if you want to be generous about money, if you want to give her money, I have no objection to your giving her your own money. If you give somebody else's money, let it be because you feel it is just and fair under the law.

Any requests to charge?

428

Mr. Frank: No requests, but I always have to take an exception when your Honor doesn't charge anything about custom.

The Court: Let it be understood that counsel has an exception due to failure to give to the jury the matter of rescue or custom. I think you have it anyhow, but I will put it in there anyhow.

Mr. Peet: There is just one thing I wasn't sure your Honor made clear to the jury, and that is this:

If the jury were to find a custom and practice existed such as Captain Holmes testified to, they must then go on and find that the railroad violated that custom and practice, and that the violation of the custom and practice in fact caused this accident.

429

The Court: Was the proximate cause of the accident, and I will add something further, and that is that the violation of the custom and practice must amount to negligence.

Mr. Peet: I just wanted to bring it out.

The Court: Yes, I think you are entitled to that charge, and I so charge.

(At this point the jury left the courtroom.)

The Court: I would like to order a sealed verdict, and we will open it tomorrow. Is that satisfactory?

430 Mr. Frank: Yes.

Mr. Peet: Yes.

The Court: Can it be opened without the presence of the jury? If not, I may have to open it Monday, because the jury doesn't come back until Monday. Is there any objection to opening a sealed verdict in the absence of the jury? If you want to poll them you can poll them Monday.

Mr. Peet: I think if we could have them back Monday, then it would be all right.

The Court: You will agree that it can be opened
431 without the presence of the jury, and then if you determine you want to poll them on Monday, it will be done.

Mr. Peet: All right.

Mr. Frank: All right.

The Court: Tomorrow morning at 10 o'clock.

(Adjourned to Friday, April 13, 1951, at 10:30 a. m.)

Brooklyn, New York,
April 13, 1951.

432 Appearances:

(As heretofore noted.)

VERDICT

The Clerk: Margaret Johnson, as Administratrix of the goods, chattels and credits of Charles Johnson, deceased against The New York, New Haven & Hartford Railroad Company. Sealed verdict to be opened.

The sealed verdict is: "We the jury find a verdict in favor of the plaintiff for the sum of $20,000."

Shall I enter judgment as of yesterday, your Honor? 433

The Court: You enter judgment as of this morning.

All right. Any motions?

Mr. Peet: Yes, sir. On behalf of the defendant, The New York, New Haven & Hartford Railroad, I move to set aside the verdict on the ground that it is contrary to the law and contrary to the evidence and contrary to the weight of the evidence and excessive.

The Court: You don't mean it is excessive. You don't mean that, do you?

Mr. Peet: Well, I certainly would like to reserve my right to discuss it.

The Court: I do not think it is excessive at all. On 434
that I rule against you right away.

Now, I think, Mr. Frank, I ought to have a brief on it. It is a very difficult case and I would like a time—I would like the minutes and I would like a brief and I would like a little time to look it over because I think it is a case that I should write an opinion on.

Mr. Frank: Supposing we order the minutes and we share the cost of them.

Mr. Peet: That is agreeable.

The Court: How much time do you want to file a brief? Do you want thirty days?

Mr. Peet: Wouldn't it depend upon—— 435

The Court: Suppose you get your minutes and then tell me what day you agree upon. I want to get it through before I go away in June. I have motions in June. I would like to have the brief some time before the end of May so that I write whatever decision I might write in May.

Mr. Frank: We can agree upon a tentative date.

The Court: Suppose I say all briefs by May 21st.

Mr. Frank: Would your Honor think that Mr. Peet ought to serve me with his brief so that I can answer.

436 The Court: You serve your main brief and then you each have 48 hours to answer them and that is the end of it.

Do you think you can get together on this thing now? (Discussion off the record.)

Plaintiff's Exhibit 1.

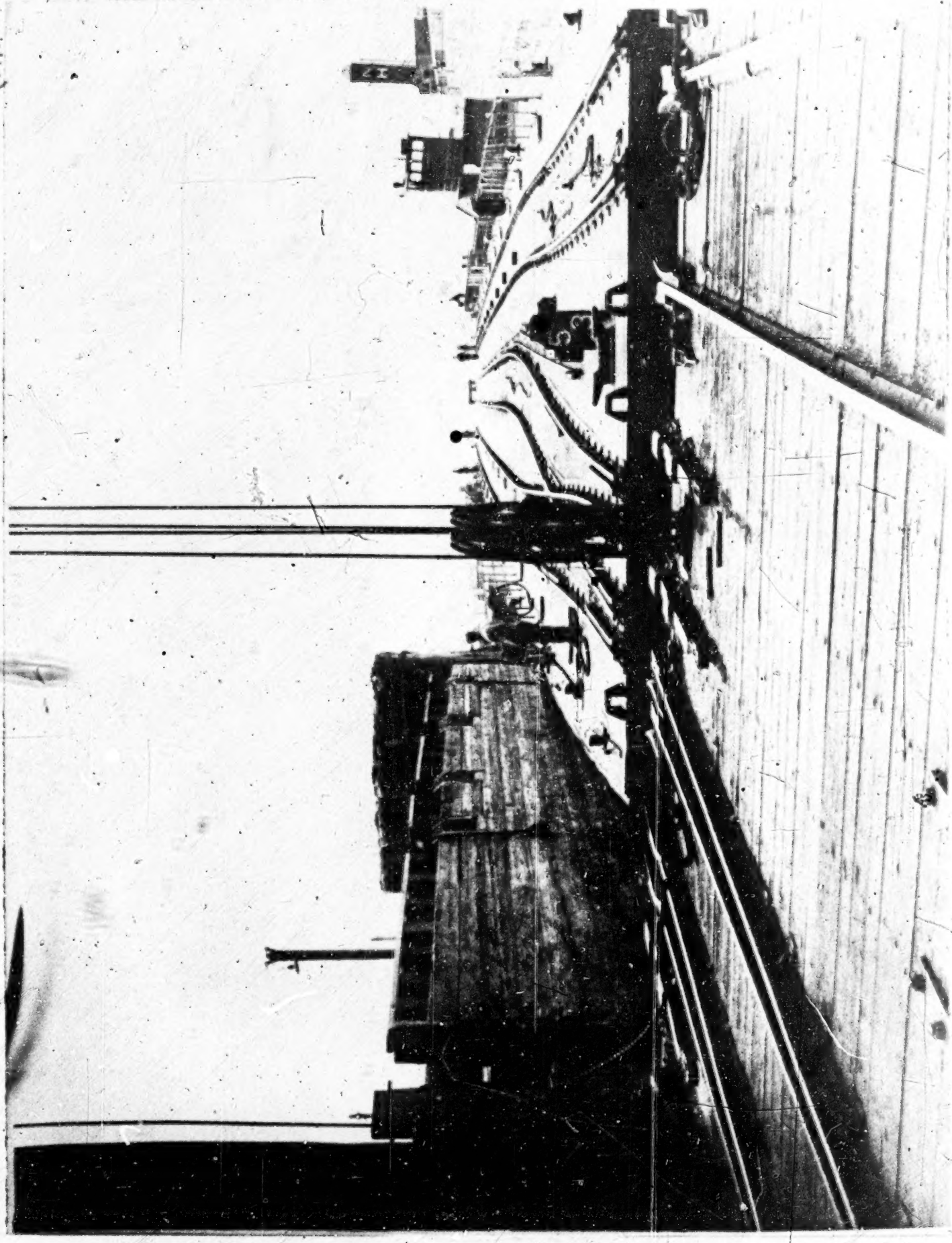
437 Photograph of Car Float "No. 53" and "Transfer No. 10", looking south from Bridge No. 11.

(PHOTOPRINT.)

[*For the Convenience of Court and Counsel This Exhibit (Photostatic Copy) Is Bound in on the Opposite Page.*]

438

Plaintiff's Exhibit 1.



442

Plaintiff's Exhibit 2.

Photograph of Car Float "No. 58" and "Transfer No. 10", looking south from Bridge No. 12.

443

(PHOTOPRINT.)

[*For the Convenience of Court and Counsel This Exhibit (Photostatic Copy) Is Bound in on the Opposite Page.*]

444

(p. 149)

Plaintiff's Exhibit 2.

Plaintiff's Exhibit 3.

448

LETTERS OF ADMINISTRATION

THE PEOPLE OF THE STATE OF NEW YORK

To Margaret Johnson A 2538
of New York County, New York 1947

send greetings:

WHEREAS Charles Johnson died intestate on the 22nd day of April, 1946, and

449

WHEREAS the decree of this court made the 20th day of January, 1948 directed the issuance to you of letters of administration upon your qualifying according to law,

NOW, THEREFORE, KNOW YE that you are hereby authorized to administer the estate of the said deceased subject to the jurisdiction and supervision of this court.

WITNESS, Hon. William T. Collins, a Surrogate of the County of New York, this 22nd day of January, 1948.

450

GEORGE LOESCH
Clerk

Plaintiff's Exhibit 3.

Liber 441 Page 219 451

NOTICE

Attention is called to the provisions of §231 and §104 of the Surrogate's Court Act, which make it a misdemeanor and a cause for removal for an executor, administrator, trustee or guardian to deposit or invest estate funds in his individual account or name. All estate funds must be deposited in the name of the executor, administrator, trustee or guardian in his or her representative capacity and to the credit of the estate.

452

453

454

Plaintiff's Exhibit 4.

Certificate of death.

455

(PHOTOPRINT.)

[*For the Convenience of Court and Counsel This Exhibit (Photostatic Copy) Is Bound in on the Opposite Page.*]

456

Plaintiff's Exhibit 4.

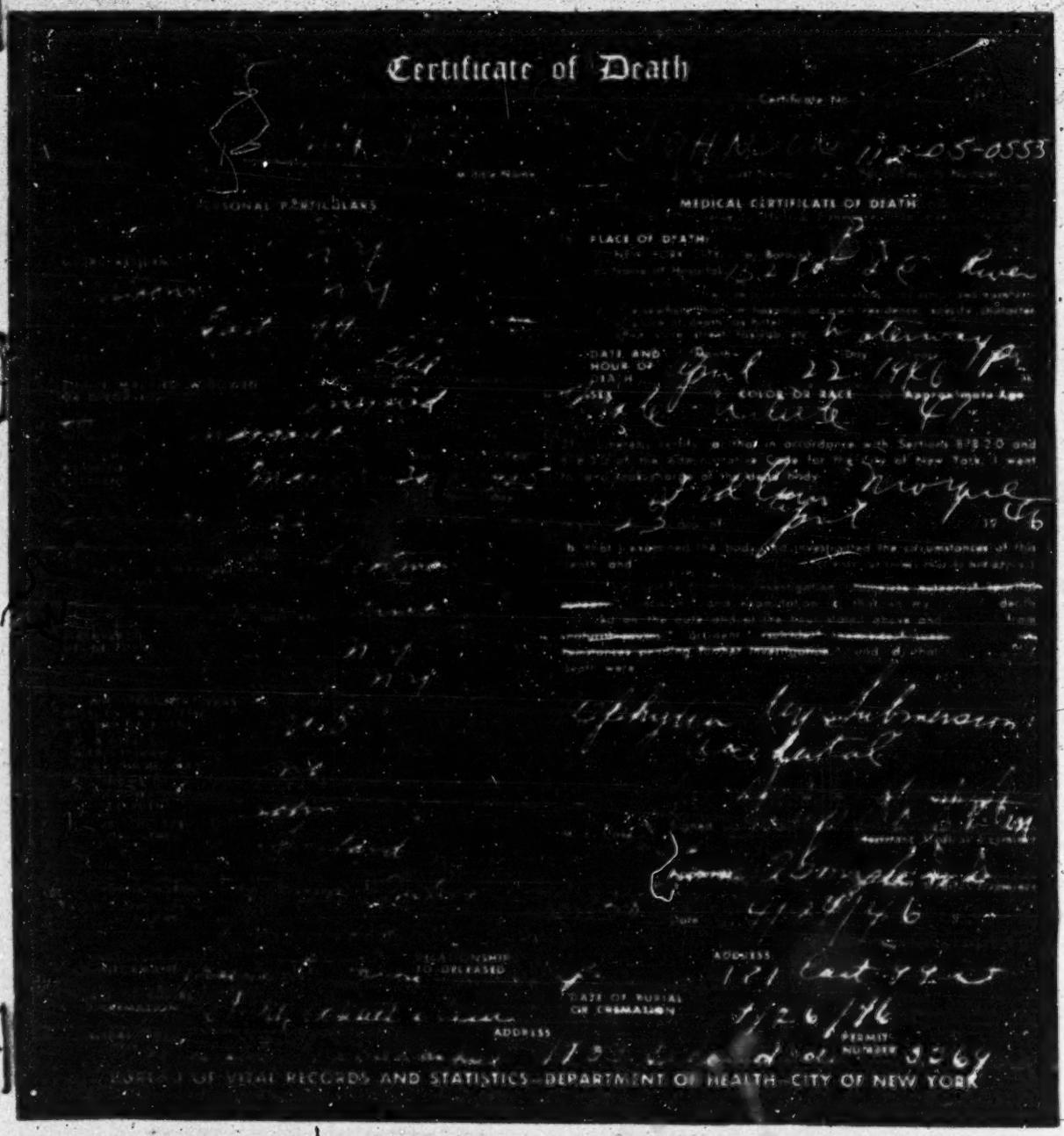
(P. 153)

CITY OF NEW YORK
DEPARTMENT OF HEALTH
BUREAU OF RECORDS AND STATISTICS

MAY 20 1946

Borough of BRONX. New York, N. Y.

Below is a photostatic copy of a certificate on file in the Bureau of Records and Statistics of the Department of Health of the City of New York.



Certificate of Death

MEDICAL CERTIFICATE OF DEATH

FURNISH TO UNDERTAKER

DATE OF BURIAL OR CREMATION

ADDRESS

PERMIT NUMBER

BUREAU OF VITAL RECORDS AND STATISTICS—DEPARTMENT OF HEALTH—CITY OF NEW YORK

This is to certify that the foregoing is a true copy of a record in my custody.

CARL L. ERHARDT
Acting Registrar of Records

BY Paul E. Stern
Acting Assistant Registrar of Records

WARNING: DO NOT ACCEPT THIS TRANSCRIPT UNLESS THE RAISED SEAL OF THE DEPARTMENT OF HEALTH IS AFFIXED THEREON. THE REPRODUCTION OF THIS TRANSCRIPT IS PROHIBITED.

NOTICE: In issuing this transcript of the Record, the Department of Health of the City of New York does not certify to the truth of the statements made thereon, as no inquiry as to the facts has been provided by law.

Certificate of Death

Certificate No.

NAME OF DECEASED: CHARLES (First Name) JOHNSON (Last Name) 112-05-0553 (Social Security Number)

PERSONAL PARTICULARS

2. USUAL RESIDENCE: N Y — Bronx — N Y — 121 East 99 St
3. SINGLE, MARRIED, WIDOWED, OR DIVORCED: Life married
4. WIFE / HUSBAND: Margaret
5. DATE OF BIRTH OF DECEDENT: Month: March Day: 30 Year: 1905
   AGE: 41 yrs 0 mos 22 days hrs or min (if LESS than 1 day)
6. OCCUPATION: (specify kind of work done, as spinner, lawyer, bookkeeper, etc.) Floorman
   (specify whether in silk mill, own business, etc.) Rest
7. BIRTHPLACE OF DECEDENT: N Y — N Y
8. OF WHAT COUNTRY WAS DECEDENT A CITIZEN AT TIME OF DEATH? U.S.
   WAS DECEASED WAR VETERAN? (IF SO, NAME WAR) no
9. PARENTS OF DECEASED — NAME OF FATHER OF DECEDENT: John
   BIRTHPLACE OF FATHER: Finland
   MAIDEN NAME OF MOTHER OF DECEDENT: Emma Luber
   BIRTHPLACE OF MOTHER:

MEDICAL CERTIFICATE OF DEATH

(To be filled in by Medical Examiner. See over.)

16. PLACE OF DEATH: (a) NEW YO[illegible] (b) Borough: Bx
    (c) Name of Hospital or Institution: [illegible]2 Dr & C Riv
    (If not in hospital or institution, give street and number)
    (d) If elsewhere than in hospital or own residence, specify character of place of death, as hotel, office, store, street, taxicab, etc.: Gateway
17. DATE AND HOUR OF DEATH: (Month) April (Day) 22 (Year) 1946 11 A.M.
18. SEX: Male 19. COLOR OR RACE: White 20. Approximate Age: 47

21. I hereby certify (a) that in accordance with Sections 878-2.0 and 878-3.0 of the Administrative Code for the City of New York, I went to, and took charge of the dead body at [illegible] Morgue this 23 day of April 1946

(b) that I examined the body and investigated the circumstances of this death, and

*(Cross out terms that do not apply.)

I further certify from the investigation, ~~[illegible]~~* (incision)* and examination (c) that, in my [illegible]n, death occurred on the date and at the hour stated above and from ~~[illegible]~~* (accident)* ~~[illegible]~~*, and (d) that the cause of death were:

Asphyxia by Submersion (Accidental)

M. E. Case No. 728

Signed: Philip Klein, Assistant Medical Examiner
[illegible] Gonzalez M.D., Chief Medical Examiner
Date 4/23/46

SIGNATURE OF INFORMANT: [illegible] RELATIONSHIP TO DECEASED: [illegible] ADDRESS: 121 East 99 St

PLACE OF BURIAL OR CREMATION: St Michael's Cem DATE OF BURIAL OR CREMATION: 7/26/46

FUNERAL DIRECTOR: William F. Lowande ADDRESS: 1793 Lexington Ave PERMIT NUMBER: 3569

BUREAU OF VITAL RECORDS AND STATISTICS—DEPARTMENT OF HEALTH—CITY OF NEW YORK

460

Defendant's Exhibit A.

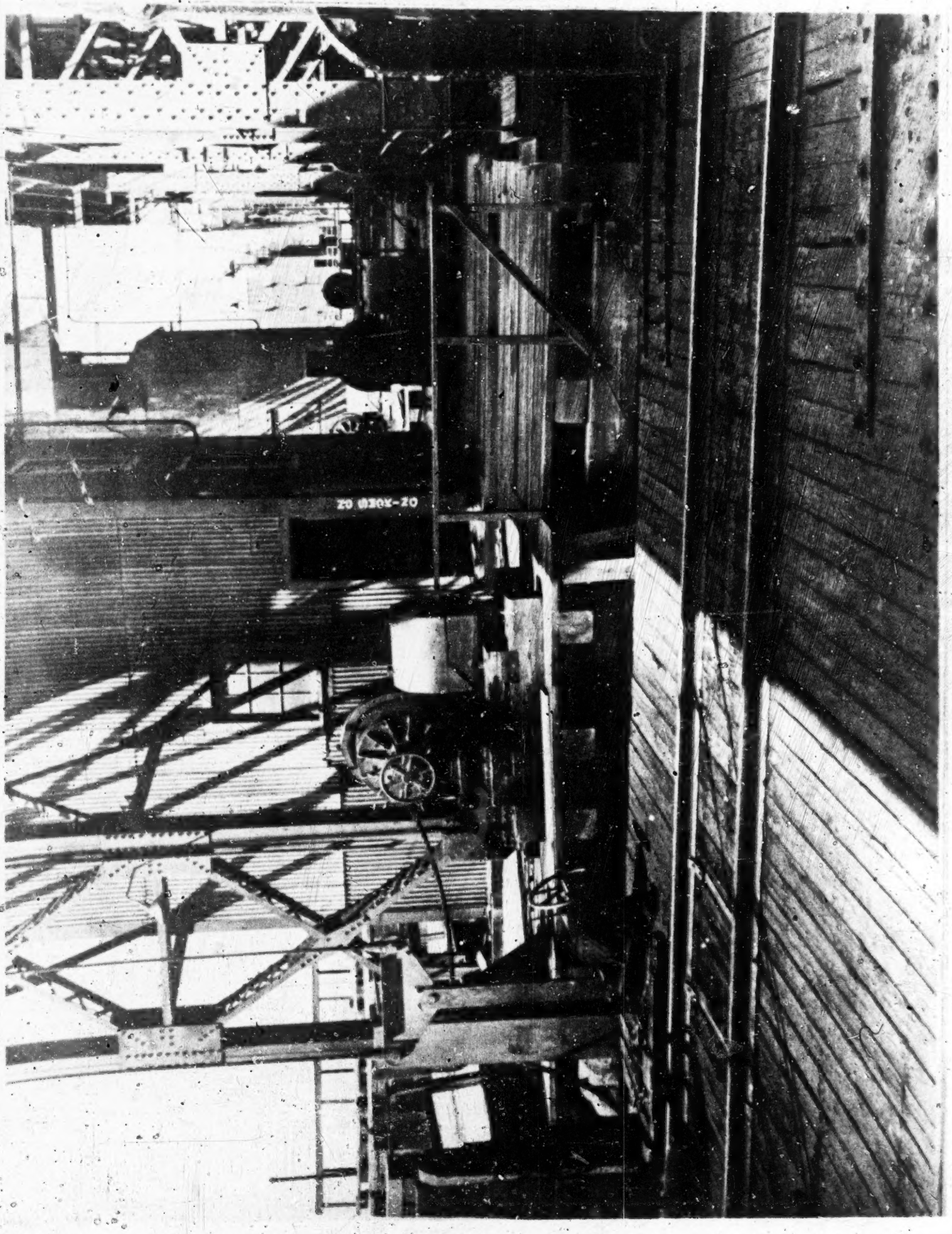
461 Photograph of apron of Bridge No. 12 looking west toward Bridge No. 11.

(1 HOTOPRINT.)

[For the Convenience of Court and Counsel This Exhibit (Photostatic Copy) Is Bound in on the Opposite Page.]

462

Defendant's Exhibit A.



466

Defendant's Exhibit B.

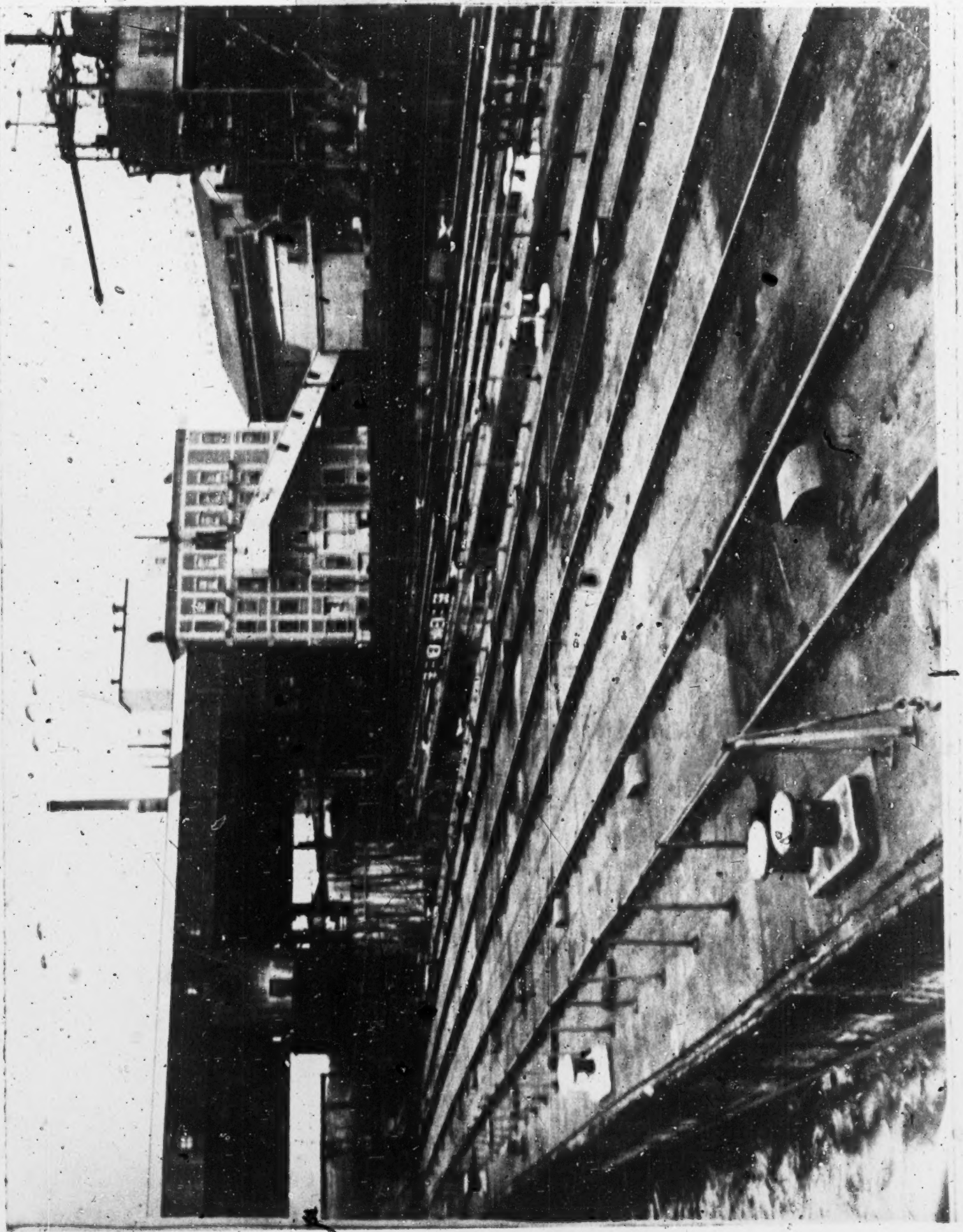
Photograph of Car Float "No. 53" in Bridge No. 11 and
467 Car Float "No. 58" in Bridge No. 12, looking northeast from "Transfer No. 10".

(PHOTOPRINT.)

[*For the Convenience of Court and Counsel This Exhibit (Photostatic Copy) Is Bound in on the Opposite Page.*]

468

Defendant's Exhibit B.



Defendant's Exhibit C.

472

2371 Second Avenue
New York City
May 31st 1943

Dear Sir:—

I would like to inform you that my husband has not been feeling well for several weeks he has been complaining of his stomach, and through his ailment he had to visit a doctor, he advised him to rest up for several weeks so he went to my sisters place up in the mountains. I will write you to let you know how he is getting
473 along and how soon he will be able to report for work.

I Remain,

Yours Sincerely,

MARGARET JOHNSON

Judgment.

[SAME TITLE.]

474 The jury empanelled in the above action having rendered a verdict in favor of the plaintiff in the sum of $20,000.00,

It is accordingly adjudged that judgment in the sum of $20,000.00 be and is hereby entered and that judgment be docketed accordingly, and the bill of costs when taxed be docketed.

Dated: Brooklyn, N. Y., April 13, 1951.

PERCY G. B. GILKES,
Clerk.

By CHAS. J. PLAYNE,
Deputy Clerk.

Decision–Opinion of Abruzzo, *D. J.*, Denying Motions of Defendant.

475

Civil Action No. 8871.

June 20, 1951.

DAVID M. FINK and JACQUIN FRANK, Attorneys for Plaintiff; Jacquin Frank, of Counsel.

EDWARD R. BRUMLEY, Attorney for Defendant; R. M. Peet, of Counsel.

ABRUZZO, *D. J.*

476

After a trial of this action before the Court and a jury, the plaintiff obtained a verdict in the sum of $20,000. The plaintiff's intestate was 41 years of age at the time he was killed, and was employed by the defendant as a floatman on its tug Transfer 10. He met his death by drowning on April 22, 1946. Prior to his death he had worked for the defendant for approximately 9 years and on this particular boat for about 3 months. He was an experienced man, qualified in his job, and was a good swimmer. He left surviving him a wife and two children, 15 and 17 years of age, and was earning on an average of $45 per week.

477

Upon the rendition of the verdict, various motions were made by the defendant (1) to set aside the verdict on the ground that it was contrary to law; (2) that it was contrary to the evidence; (3) contrary to the weight of the evidence; and (4) that the verdict was excessive. I ruled that the verdict was not excessive and reserved decision on the first three grounds just alluded to.

Tug crew of the tug Transfer 10 consisted of Captain O'Brien, first mate Gaglio, second mate Santalesa (since deceased), and the deceased, and below the deck an engineer, a fireman, and an oiler. At the time of the oc-

478 currence of this accident, the tug had been directed to move a pair of light car floats numbers 53 and 58 from Bridges 11 and 12 to Pier 3 at the Church E. Gates Pier about 500 feet distant. Number 53 was in Bridge 11 and 58 in Bridge 12, and both were tied to the bridges, bow in. These floats were about 340 feet long, 40 feet wide, with 5 feet of freeboard. Between these car floats was a short rack about 40 to 60 feet long, and on the outer side of each car float was a long rack extending out much farther than the short one. Each car float was secured to the short rack by a line near its bow and to
479 the long rack by a line near its stern. These lines were attached to the racks when not in use. It was the custom and practice that when the last line had been released a signal "all gone" was shouted to the captain of the tug to let him know that the lines were cast off so that he could move these car floats.

After the tug reached Bridges 11 and 12, Captain O'Brien remained in the tug's pilot house which was about 10 feet above the tug's deck. It was glass-enclosed but one or two windows were open. In the operation of this movement, Gaglio, the first mate, and Johnson
480 boarded Float 53. Johnson was last seen by Gaglio walking toward the bow of the float where it was Johnson's duty to release the lines from the short rack. It was Gaglio's duty to secure both car floats by a line placed on bitts about 12 to 15 feet in from the stern of these car floats. It was Johnson's duty after he removed the line from Float 53 to walk across an apron from Bridge 11 to Bridge 12, board car float 58, and remove the short rack line from the bow of that float.

There is no eye witness to this accident and negligence, if any, depends in part upon presumptions. Whether this last operation was entirely finished by Johnson is not known because neither Captain O'Brien nor Gaglio

481

could see the port bow corner of car float 58 where this short rack line had to be released due to the fact that this short rack line was high enough to block their view, but both did testify that they received the signal "all gone." Neither one recognized Johnson's voice and did not know who it was that gave the signal. After Captain O'Brien received this so-called "all gone" signal, he sounded the slip whistle and pulled out of the slip without any difficulties. While he was pulling out of the slip it was the custom and practice and the duty of Johnson to stay at the port bow of Float 58 while the car floats were pulled out in order to secure them with lines as their bows came together. It will thus be seen that it was Gaglio at the stern who would lash the two floats together at that point and Johnson who would lash them together at the bow.

482

Captain O'Brien testified that when the Float 58 had cleared the long rack he noticed that Johnson was not on board. He then asked Gaglio where Johnson was but Gaglio did not know. The tug nevertheless, without stopping, proceeded to the Church E. Gates dock without attempting to discover the whereabouts of Johnson, left the carfloats at that dock, and then returned. This entire operation took, the testimony indicates, about 25 minutes. Upon returning, the tug sounded three short whistles which signified that Captain O'Brien wanted Johnson to return to the tug. As he did not appear the Captain sent Gaglio to look for him. Gaglio testified that he looked in the bridge master's office, the locker room, and rope shanty, and then discovered something floating near Bridge 12 in the water and reported this to the Captain. Both went back to Bridge 12, lowered the apron, and then discovered Johnson's body was floating in the water about 3 feet from the apron, and hauled him in.

483

Decision–Opinion of Abruzzo, D. J., Denying Motions of Defendant.

484

The action is under the Jones Act, 46 U. S. C. A. 688. The sole question submitted by the Court to the jury was the issue as to whether or not the defendant was negligent through Captain O'Brien in failing to follow customary precautions and procedure before pulling away from the slip. The plaintiff lays great stress upon the fact that Captain O'Brien pulled out of this slip before ascertaining whether the "all gone" signal was in fact given to him by Johnson. The defendant on the contrary relies upon the theory that Captain O'Brien followed a usual custom and practice in pulling out
485 when he obtained the "all gone" signal, even though Captain O'Brien did not recognize Johnson's voice. What happened to Johnson and how he fell into the water will never be known. One can indulge in many presumptions but all conclusions would be based upon a hypothesis that one could never be sure of. The deceased cannot speak for himself. The only two witnesses called were in the employ of the defendant, and the plaintiff was compelled of necessity to draw the facts from witnesses who at least could be said to be interested witnesses.

486 The simple issue is whether or not Captain O'Brien should have moved his tug when he got the "all gone" signal without recognizing that it was Johnson's voice. He had worked with him before in operations of this kind, the usual custom and practice obtaining in other movements were followed on this night, but there was no proof offered that Captain O'Brien in previous movements pulled out of a slip without recognizing the voice of his own crew.

Both sides called experts who testified as to the usual customary practice to be followed in the various movements made this night. Their opinions were conflicting. Captain Holmes who testified for the plaintiff had actual experience as a captain of similar tugs moving similar

487

floats from 1914 to 1944 with the Pennsylvania Railroad Company and from 1944 to 1949 with the Mesick Towing Lines. He testified that if the captain was unable from his position in the pilot house to see Johnson and was unable to recognize the voice that gave the signal "all gone," then it was customary to send a man over to a position where he could observe whether the floatman was on board, in a safe position, and was the person who had given the signal. It is apparently the contention here that Captain O'Brien before making any movement after he obtained the "all gone" signal without recognizing the voice should have sent Gaglio to see whether Johnson actually gave the signal and was in a safe position for the tug and floats to move. In support of that contention, the plaintiff cites the case of *Southern Ry. Co.* v. *Hermans,* 44 F. (2d) 366 (C. C. A. 4th).

488

It must be borne in mind that it was Johnson's duty to stay on his car float to lash these two floats together and he would have been derelict in his duty had he gone on shore, for it would then have become dangerous for the tug to move these two floats without having them lashed both bow and stern.

Captain DeMars, the expert called by the defendant, testified that it was the custom and practice to do just as Captain O'Brien did, and that there was no custom or practice that required a man be sent on an empty float to identify whose voice it was that gave the signal.

489

It seems to me to be more logical to accept the view of the plaintiff's contention, and apparently the jury accepted the testimony of Captain Holmes and not that of Captain DeMars. They thus found Captain O'Brien guilty of negligence. The jury found that there was a custom and practice in and around the Port of New York not to move the car float until Johnson's voice was recognized, especially when he could not be seen. Had Captain O'Brien followed the custom and practice which the jury

490 found existed, this accident might not have occurred. He should not have started his tug without having made certain that it was Johnson who gave the "all gone" signal. The deceased fell into the water undoubtedly after the car float moved out of the slip. Had Captain O'Brien checked, as he should have done, as to Johnson's whereabouts before he moved out of the slip, undoubtedly Johnson would not have fallen into the water.

I think the contentions raised by the defendant must be overruled and the verdict of the jury be allowed to stand.

491

MATTHEW ABRUZZO,
U. S. D. J.

Order Denying Defendant's Motions Appealed From.

[SAME TITLE.]

492 The defendant having moved this Court, at the close of plaintiff's case, to dismiss the complaint; and the Court having reserved its decision on said motion; and the defendant having renewed its aforesaid motion, and moved this Court, at the close of the entire case, for a directed verdict in its favor; and the Court having reserved its decision on said motions; and the defendant having moved this Court to set aside the verdict of the jury, rendered on the 13th day of April, 1951, in favor of the plaintiff in the sum of Twenty Thousand ($20,000.00) Dollars on the ground that it is contrary to the law, contrary to the evidence and contrary to the weight of evidence and excessive; and the Court having ruled on the 13th day of April, 1951, that said

verdict was not excessive; and the Court having reserved decision to set aside the verdict on the ground that it is contrary to the law, contrary to the evidence and contrary to the weight of evidence; and due deliberation having been had and the Court having filed its opinion and rendered a decision on the 20th day of June, 1951, 493

Now, on motion of Edward R. Brumley, the attorney for the defendant, it is

ORDERED, that the motions of the defendant for a dismissal of the complaint, for a direction of a verdict in its favor and for setting aside the verdict be and the same hereby are overruled and denied and that the verdict of the jury be allowed to stand. 494

Dated: Brooklyn, N. Y., June 29th, 1951.

MATTHEW T. ABRUZZO,
U. S. D. J.

495

Notice of Appeal.

496

UNITED STATES DISTRICT COURT,

EASTERN DISTRICT OF NEW YORK.

Civil 8871.

MARGARET JOHNSON, as Administratrix of the goods, chattels and credits of Charles Johnson, deceased,

Plaintiff,

—against—

497

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY,

Defendant.

Sirs:

PLEASE TAKE NOTICE, that the above named defendant, The New York, New Haven and Hartford Railroad Company, hereby appeals to the United States Court of Appeals for the Second Circuit, from an order denying its motions for
498 a dismissal of the complaint, for a direction of a verdict in its favor and for setting aside the verdict, entered herein in the office of the Clerk of the United States District Court for the Eastern District of New York on the 29th day of June, 1951; and the above named defendant also appeals from each and every part of the final judgment entered herein in the office of the Clerk of said United States District Court on the 13th day of April, 1951 in favor of the plaintiff and against the defendant in the sum of $20,000; and from the costs as taxed and entered herein in the office of the Clerk of said United States District

Court on the 29th day of June, 1951 in favor of the plaintiff and against the defendant in the sum of $183.33. 499

Dated: New York, N. Y., July 6, 1951.

Yours, etc.,

EDWARD R. BRUMLEY,
Attorney for Defendant,
Office and Post Office Address,
Room 3841, Grand Central Terminal,
Borough of Manhattan,
New York 17, N. Y. 500

To:

David M. Fink & Jacquin Frank, Esqs.,
Attorneys for Plaintiff,
141 Broadway, New York.

Hon. Percy G. B. Gilkes,
Clerk, United States District Court,
Eastern District of New York.

501

Stipulation as to Exhibits.

502

UNITED STATES COURT OF APPEALS,

FOR THE SECOND CIRCUIT.

MARGARET JOHNSON, as Administratrix of the goods, chattels and credits of Charles Johnson, deceased,

Plaintiff-Appellee,

—against—

503 THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY,

Defendant-Appellant.

IT IS HEREBY STIPULATED AND AGREED by and between the respective parties hereto that any original exhibit printed in this record may be handed up to the Court at the time of the argument of the appeal by the attorneys for the respective parties hereto.

Dated, New York, August 27th, 1951.

504

EDWARD R. BRUMLEY,
Attorney for Defendant-Appellant.

DAVID M. FINK and JACQUIN FRANK,
Attorneys for Plaintiff-Appellee.

Stipulation as to Record.

505

UNITED STATES DISTRICT COURT,

EASTERN DISTRICT OF NEW YORK.

MARGARET JOHNSON, as Administratrix of the goods, chattels and credits of Charles Johnson, deceased,

Plaintiff-Appellee,

—against—

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY,

506

Defendant-Appellant.

IT IS HEREBY STIPULATED AND AGREED that the foregoing is the record on appeal in the above entitled matter as agreed upon by the parties.

Dated, New York, August 27th, 1951.

EDWARD R. BRUMLEY,
Attorney for Defendant-Appellant.

507

DAVID M. FINK & JACQUIN FRANK,
Attorneys for Plaintiff-Appellee.

Clerk's Certificate.

508

UNITED STATES DISTRICT COURT,

EASTERN DISTRICT OF NEW YORK.

(Civil Action No. 8871.)

MARGARET JOHNSON, as Administratrix of the goods, chattels and credits of Charles Johnson, deceased,

Plaintiff-Appellee,

—against—

509 THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY,

Defendant-Appellant.

United States of America,
Eastern District of New York—ss.:

I, PERCY G. B. GILKES, Clerk of the District Court of the United States of America for the Eastern District of New York, do hereby certify that the foregoing is the record on appeal as agreed on by the parties, and that
510 the last day to file said record is Sept. 8, 1951.

IN TESTIMONY WHEREOF, I have caused the seal of the said Court to be hereunto affixed at the Borough of Brooklyn, City of New York, in the Eastern District of New York, this 29th day of August, in the year of our Lord One Thousand Nine Hundred Fifty-One and of the Independence of the said United States the One Hundred Seventy-Sixth.

PERCY G. B. GILKES,
Clerk.

(Seal)

[fol. 171] UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, OCTOBER TERM, 1951

No. 74

(Argued November 8, 1951. Decided February 4, 1952)

Docket No. 22134

MARGARET JOHNSON, as Administratrix of the Goods, Chattels and Credits of Charles Johnson, Deceased, Plaintiff-Appellee,

v.

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, Defendant-Appellant

Before Swan and Frank, Circuit Judges and Coxe, District Judge

Appeal from the United States District Court for the Eastern District of New York

Action under the Jones Act for negligently causing the death of the plaintiff's intestate. From a judgment for the plaintiff upon verdict of a jury, the defendant appeals. Judgment reversed.

Edward R. Brumley, Attorney for appellant; Robert M. Peet, of counsel.

David M. Fink & Jacquin Frank, Attorneys for appellee; Jacquin Frank, of counsel.

[fol. 172] SWAN, Chief Judge:

This is an appeal by the defendant from a judgment for the plaintiff after trial to a jury in an action brought under the Jones Act, 46 U. S. C. A. § 688, to recover damages for the death of the plaintiff's intestate. The decedent was an experienced floatman, employed on the defendant's tug "Transfer No. 10." He met his death by drowning on April 22, 1946 while the tug was removing two empty car-floats from defendant's Oak Point railroad yard on the East River. No eyewitness saw the accident, nor was the fact of the floatman's death known until after the tug had

completed its maneuver. His body was later discovered floating in the slip close to the apron of Bridge 12. The questions raised by the appeal are (1) whether there was adequate proof of the defendant's negligence, and (2) whether, if negligence was proved, there was proof that such negligence caused the decedent's death. These questions were raised below by a motion for a directed verdict which the court reserved and denied with an opinion after the jury's verdict.

The carfloats which the tug removed from the Oak Point yard were numbered 53 and 58. Carfloat 53 was in Bridge 11 and carfloat 58 in Bridge 12; each was lying bow in and was 340 feet in length and 40 feet wide. Between the bridges was a pier about 50 feet long referred to in the testimony as the "short rack." On the outer sides of the bridges were longer piers referred to as "long racks." The floats were held in the bridges by rack lines. Testimony as to how the maneuver of removing the floats was performed was given by the master and mate of the tug. The captain put the bow of the tug against the port stern quarter of float 53, and the mate Gaglio then stepped aboard float 53 and went toward its stern to secure the sterns of the floats with a line as soon as the tug had pushed them together. Having performed this duty, Gaglio returned to a place on [fol. 173] the float near the tug to handle the tug's bow line. Johnson, the floatman, had followed Gaglio on to the 53 and when last seen alive was walking toward its bow. His duty was to release the short rack line in Bridge 11, go ashore and cross over to Bridge 12, get aboard float 58, release the short rack line in Bridge 12, and then shout "all gone" as a signal that the floats were ready to be moved. He was then to remain at the bow of the 58 in readiness to secure the bows of the two floats when they came together after being pulled clear of the short rack. From the tug's pilot house Capt. O'Brien saw that both rack lines in Bridge 11 and the long rack line Bridge 12 were released. The short rack blocked vision of the short rack line in Bridge 12 to Capt. O'Brien and also to the mate. Both of them heard the shout "all gone" but each testified that he could not identify the voice as Johnson's because of the distance of the shouter. When Capt. O'Brien heard the signal shout "all gone," he sounded a long slip whistle and with engines reversed slowly

pulled the floats out into the river. They came out without any trouble and it later appeared that in fact the short rack line in Bridge 12 had not rended; hence it must have been released. Capt. O'Brien's procedure on this occasion was the same as he had always followed during 19 years of service. When the tug was in the river clear of the long racks the captain first observed that Johnson was not on the bow of the 58. He asked Gaglio where Johnson was and the latter replied that he did not know. At no time while the floats were being moved was any splash or call for help heard or anything unusual observed. Johnson was known to be a good swimmer. When the captain discovered that Johnson was not on the 58, he ordered Gaglio to fasten the floats together at their bows and he then proceeded to his nearby destination at the Gates dock. As soon as the floats were tied up there, he brought the tug back to the Oak Point [fol. 174] yard. He figured that to proceed to destination and return light would take less time than to place the floats back in the bridges. As the light tug was approaching the yard, the captain blew a signal for Johnson to return to the tug; he then sent the mate ashore to look for him. Upon receiving Gaglio's report that Johnson could not be found, he ordered him to look around the float bridges. At Bridge 12 Gaglio discovered something floating in the water. He reported this to the captain and they both then went to Bridge 12 and hauled from the slip Johnson's body. Attempts to revive him by artificial respiration were unavailing. They saw no cuts, bruises or marks on the body, but Mrs. Johnson and her daughter testified that at the funeral parlor they noticed scrape marks on his forehead.

The only disputed testimony was given by expert witnesses. Holmes, a retired tug captain whose experience had been chiefly in handling carfloats for the Pennsylvania Railroad, was called as an expert witness by the plaintiff. He testified that the common custom and practice in New York Harbor required a tug captain before moving his floats after hearing the "all gone" signal, if he could not see the shouter and did not recognize his voice, to send a deck-hand to see whether the man who released the last rack line was in a safe position. Capt. DeMars, who testified as an expert for the defendant, denied the existence of any such practice even as to Pennsylvania carfloats and

stated that the common custom and practice in New York Harbor was to operate as Capt. O'Brien had done. The only issues submitted to the jury as to negligence were whether there existed a well-known custom and practice such as Capt. Holmes had described; whether, if such a custom did exist, the defendant violated it and whether the violation was the proximate cause of Johnson's death. The jury returned a verdict for the plaintiff.

[fol. 175] The appellant contends that the testimony fails to prove the existence of any well-known custom and practice such as Captain Holmes described. He could and did testify as to his own practice during the many years he worked as a tug-boat captain for the Pennsylvania Railroad. But the practice of one railroad is not sufficient to prove a common custom and practice. Petition of *Highlands Nav. Corporation*, 2 Cir., 29 F. 2d 37, 38; *Willis* v. *Pennsylvania R. Co.*, 2 Cir., 122 F. 2d 248, 250, cert. den. 314 U. S. 684. Captain Holmes' opportunities to observe what other railroads did under similar circumstances had been few and his testimony as to their practice is far from convincing. But the jury chose to believe it, and we are not prepared to hold that it is so inherently incredible as to permit this court to substitute its judgment for theirs. See *Bailey* v. *Central Vermont Ry.*, 319 U. S. 350, 353-4; *Shiffler* v. *Pennsylvania R. Co.*, 3 Cir., 176 F. 2d 368, 369.

Even on the assumption that the custom existed and was violated, the judgment can be supported only if the evidence justified a finding that the violation had a causal relation to Johnson's death. When last seen alive he was walking toward the bow of float 53. It is a legitimate inference that he went ashore, crossed over to the 58 and had at least loosed the short rack line since the float was pulled out without breaking it. To get into the water he must either have fallen or jumped. Conceivably after loosening the line he may have attempted to jump to the apron of Bridge 12 in order to remain ashore until the tug should return. Capt. DeMars testified that it is not unusual on such a short maneuver for a floatman, when he lets his line go, to jump ashore. However, since Johnson's duty was to remain abroad and tie together the bows of the floats, we think it a more reasonable inference that he accidentally fell from the 58. But what caused him to fall seems to us wholly conjectural. The

[fol. 176] plaintiff argues that the jury could infer that while he was loosening the rack line, the tug started to pull the float out before he expected, causing him to lose his footing and strike his forehead in some way that knocked him unconscious and threw him overboard. But the supposition that the tug started pulling out the float before he expected, presupposes that he did not shout the signal "all gone." The appellee argues that a bridgeman may have shouted "all gone" when he released one of the long rack lines, but no witness observed any bridgeman in the neighborhood. It was Johnson's duty, not the duty of a bridgeman, to give the signal when the short rack line was free, and the assumption that someone other than Johnson gave it at that precise moment seems to us pure conjecture. It is at least equally reasonable to infer that Johnson did give the signal for the tug to start and thereafter stumbled or for some other unknown cause fell and knocked himself unconscious. The record is a complete blank as to how or why he fell overboard. It is of course true that not always must a jury's verdict fall if it involves speculation and conjecture. As stated in *Lavender* v. *Kurn*, 327 U. S. 645, at 653, when "the evidence is such that fair minded men may draw different inferences, a measure of speculation and conjecture is required on the part of those whose duty it is to settle the dispute by choosing what seems to them to be the most reasonable inference. Only when there is a complete absence of probative facts to support the conclusion reached does a reversible error appear." In the case at bar we think there was a complete absence of probative facts to support the conclusion that Captain O'Brien's failure to send a man to see where Johnson was when the "all gone" signal was heard caused his death. On the issue of causation the plaintiff had the burden of proof. In our opinion the motion for a directed verdict should have been granted. Accordingly the judgment is reversed.

[fol. 177] UNITED STATES COURT OF APPEALS, SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 4th day of February one thousand nine hundred and fifty-two.

Present: Hon. Thomas W. Swan, Chief Judge; Hon. Jerome N. Frank, Circuit Judge; Hon. Alfred C. Coxe, District Judge.

MARGARET JOHNSON, Admnx., etc., Plaintiff-Appellee,

v.

THE NEW YORK, NEW HAVEN & HARTFORD RAILROAD CO., Defendant-Appellant

Appeal from the District Court of the United States for the Eastern District of New York

This cause came on to be heard on the transcript of record from the District Court of the United States for the Eastern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is reversed with costs.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

Alexander M. Bell, Clerk.

[fol. 178] [Endorsed:] United States Court of Appeals, Second Circuit. Margaret Johnson, Admnx., etc., v. New York, New Haven & Hartford Railroad Co. 74. Judgment. United States Court of Appeals, Second Circuit. Filed Feb. 4, 1952. Alexander M. Bell, Clerk.

Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 179] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1951

No. 729

MARGARET JOHNSON, as Administratrix of the Goods, Chattels and Credits of Charles Johnson, Deceased, Petitioner,

vs.

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD CO.

ORDER ALLOWING CERTIORARI—Filed June 9, 1952

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit is granted, limited to the issue raised as to the application of Rule 50(b) of the Rules of Civil Procedure. The case is transferred to the summary docket.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Office - Supreme Court, U. S.
FILED
APR 22 1952
CHARLES ELMORE CROPLEY
CLERK

LIBRARY
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1951

No. ~~729~~ 46

MARGARET JOHNSON, as Administratrix of the Goods, Chattels and Credits of CHARLES JOHNSON, deceased,

Petitioner,

against

THE NEW YORK, NEW HAVEN & HARTFORD RAILROAD CO.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JACQUIN FRANK,
Counsel for Petitioner.

INDEX

	PAGE
The Opinions of the Courts Below	1
Jurisdiction	2
Questions Presented	2
Statutes Involved	2
Summary Statement of the Matter Involved	2
Specifications of Error to be Urged	3
Reasons for Granting the Writ	4
(1) The decision of the Court below not only was a gross injustice, but is in direct conflict with the oft-expressed decisions of this Court in the Federal Employers' Liability Act and Jones Act cases that the question of causal relationship is peculiarly one for the jury	4
(2) The Court of Appeals failed to give due weight to the declared policy of this Court that in cases under the Federal Employers' Liability Act and Jones Act the right of trial by jury should be particularly guarded	13
(3) The Court of Appeals erred in failing to order a new trial under Rule 50b of the Federal Rules of Civil Procedure, in contravention of this Court's interpretation	15
Conclusion	17
Appendix A	18
Appendix B	18
Appendix C	19

CASES CITED

	PAGE
Bailey v. Central Vermont Ry., 319 U. S. 350	13, 14
Berry v. U. S., 312 U. S. 450	14, 16
Carter v. Atlanta, etc., Ry. Co., 338 U. S. 430	14
Casey v. American Export Lines, 173 F. 2d 324	14
Cone v. West Virginia Pulp and Paper Co., 330 U. S. 212	16
Conway v. O'Brien, 312 U. S. 450	16
Corey v. Southern Pacific R. Co., 335 U. S. 520	14
Garman v. Metropolitan Life Insurance Co. (U. S. Court of Appeals, Third Cir., 1949), 175 F. 2d 24	16
Garrett v. Moore-McCormack, 317 U. S. 239	13
Globe Liquor Co. v. San Roman, 332 U. S. 571	16
Gunning v. Cooley, 281 U. S. 90	9
Hart v. Hudson River Bridge Co., 80 N. Y. 622	12
Holliday v. U. S., 315 U. S. 94	15
Ingersol v. Liberty Bank, 278 N. Y. 1	13
Jacob v. New York City, 315 U. S. 752	13
Johnson v. Griffith S. S. Co., 150 F. 2d 224	12, 14
Larsen v. U. S., 72 F. Supp. 137	14
Lavender v. Kurn, 327 U. S. 645	10
Lewis v. Ocean Accident and G. Corp., 224 N. Y. 18	12
McLeod v. Union Barge Line, 95 F. Supp. 366	9
Myers v. American Well Works (C. C. A. 4th Cir.), 114 F. 2d 252	9
Nielsen v. Richman (C. C. A. 8th Cir.), 114 F. 2d 343	9

PAGE

Panama Railroad v. Johnson, 264 U. S. 375 13
Pollard v. Seas Shipping Co., Inc. (C. C. A. 2d), 146 F. 2d 875 ..... 11, 14

Rosenberg v. Schwartz, 260 N. Y. 162 13

Sadler v. Pennsylvania Railroad Co., 159 F. 2d 784 11
Southern Ry. Co. v. Hermans, 44 F. 2d 366, 64 F. 2d 237; C. C. A. 4th Cir. 6

Tenant v. Peoria & P. Ry. Co., 321 U. S. 29 ..... 8, 9, 10, 12
Tiller, Ex. v. Atlantic Coast Line R. Co., 318 U. S. 645 10

White v. Lehigh Valley R. R. Co., 220 N. Y. 131 13
Wilkerson v. McCarthy, 336 U. S. 53 ..... 10, 13

AUTHORITIES

Federal Employer's Liability Act:
Section 51 ..... 13, 14, 18

Federal Rules of Civil Procedure:
Rule 50b 2, 15, 16, 19

Jones Act (46 U. S. C. 688) 2, 13, 14, 18

28 U. S. C., Section 1254, subdivision (1) 2

IN THE

Supreme Court of the United States

OCTOBER TERM, 1951

No. .....

MARGARET JOHNSON, as Administratrix of the Goods, Chattels and Credits of CHARLES JOHNSON, deceased,

Petitioner,

against

THE NEW YORK, NEW HAVEN & HARTFORD RAILROAD CO.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, Margaret Johnson, as administratrix of the goods, chattels and credits of Charles Johnson, deceased, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above entitled matter.

The Opinions of the Courts Below

The opinion of the District Court is ~~not officially re~~ported (R. 159-164). The opinion of the Court of Appeals was filed on February 4, 1952 and is reported in F. 2d and printed in the Transcript of Record, pp. 171 to 175.

Jurisdiction

The action was brought under the Jones Act (46 U. S. C. 688, Appendix A), claiming damages for wrongful death.

The judgment of the Court of Appeals sought to be reviewed, was rendered on February 4, 1952. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254, subdivision (1).

Questions Presented

Was the Court of Appeals for the Second Circuit justified in holding as a matter of law that there was no causal relationship between the negligence found by it and the death of the seaman, thereby depriving petitioner of a jury trial?

Was the failure by the Court of Appeals to send the case back for a new trial in contravention of Rule 50b of the Federal Rules of Civil Procedure (Appendix C)?

Statutes Involved

The pertinent provisions are printed in Appendices A, B, C, infra, pages 18-19.

Summary Statement of the Matter Involved

This is an action for wrongful death under the Jones Act brought by the widow of a deceased merchant seaman, on behalf of herself and her two minor children.

The decedent, Charles Johnson, was a member of the crew of the Tug Boat "Transfer #10", who met his death by drowning when the vessel was negligently navigated at a railroad yard pier at Oak Point, County of Bronx, City of New York.

The case was tried in the United States Court for the Eastern District of New York before a jury, and plaintiff had a verdict, which the District Court sustained. That Court refused to set aside the jury's verdict in which it found that Johnson's death was caused by defendant's negligence (R. 163-164).

Judgment on the said verdict was entered in the office of the Clerk of said United States District Court on the 20th day of June, 1951, in favor of petitioner against the New York, New Haven and Hartford Railroad Co. in the sum of $20,183.33. The Court of Appeals for the Second Circuit reversed the judgment and directed a judgment for the defendant on February 4, 1952.

The Court of Appeals in reversing the judgment upheld the jury's findings of negligence in the operation of the tug, which consisted of pulling away from the bridge before the captain of the tug had ascertained that Johnson was in a position of safety. However, the Court held that there was not sufficient evidence of causal relationship in that Johnson's fall from the float and his subsequent death may have been due to "some other unknown cause" and directed that a verdict be entered for the defendant.

Specifications of Error to be Urged

The learned Court of Appeals for the Second Circuit erred in the following respects:

(1) In holding that there was not sufficient evidence to justify the jury's finding of causal relationship between the negligence found and the death of decedent.

(2) In substituting its own inference of proximate cause for that found by the jury and thereby depriving petitioner of a jury trial.

(3) In reversing the judgment of the District Court.

(4) In failing to send the case back for a new trial.

Reasons for Granting the Writ

(1) The decision of the Court below not only was a gross injustice, but is in direct conflict with the oft-expressed decisions of this Court in the Federal Employers' Liability Act and Jones Act cases that the question of causal relationship is peculiarly one for the jury.

Charles Johnson was a floatman employed on the defendant's tug "Transfer #10" (R. 10). He met his death by drowning on April 22, 1946, while the tug was removing two empty car floats from defendant's Oak Point Railroad Yard on the East River (R. 11-12). There were no eye-witnesses, and the decedent was found floating at the point where the floats had been secured to defendant's bridge (R. 44, 45, 46). The transcript of record opposite pages 146 and 148 shows photographs of the bridges and the two car floats involved in the accident.

The empty car floats which the tug removed from the Oak Point Yard were numbered 53 and 58. Car float 53 was secured to bridge 11 and car float 58 to bridge 12, and each one of them was lying bow in (R. 17). Each car float is 340 feet in length and 40 feet wide. Between the two bridges, 11 and 12, was a pier about 50 feet long, referred to in the testimony as the "short rack". On the outer side of the two bridges were long piers, known as "long racks". The two floats were secured to the short rack by lines called "short racklines" and to the long pier or long rack by "long racklines" (R. 17, 18, 19, 21-22). All the factual testimony was given by the captain and the mate, both of whom were still in the employ of the defendant, and both of them (particularly the captain) were charged with negligence in the operation. When the tug came alongside of float 53, the mate, Gaglio, and decedent, Johnson, stepped aboard float 53 (R. 17-18). Gaglio went towards the stern of the float, so as to secure at the stern the two floats when they were pushed together by a maneuver of the tug (R. 17-18). Johnson went towards the bow, as his duty

was to remove the short rackline on float 53, and then step across to the other bridge, where he was required to remove the short rackline on the 58, and then secure the two floats to each other, once they cleared the short rack, so that when the tug finally pulled out, the two floats would be secured at the bow by Gaglio, and at the stern by Johnson (R. 18, 20-21).

The last time that Johnson was seen alive was when he walked on the 53 towards the bow (R. 20, 25). Concededly, he did remove the short rackline on the 53. Concededly, he crossed over to bridge 12 and was on the 58 at some time before the accident (Opinion p. 175). Concededly, the captain's view of the port bow was obstructed by the short rack, so that he could not see Johnson's operation. The long racklines are normally removed by men on the bridge or on the long rack, referred to in the testimony as "bridgemen" (R. 21-22, 24, 45, 64, 67, 92).

The captain has a clear view of every other part of the float with the exception of the port bow heretofore indicated, so that if Johnson had removed the long rackline on the 58, either the mate or the captain, or both, could easily have seen him (R. 70). No one contends that he removed the long racklines.

Not having a proper view, the captain relies on a well-recognized signal from Johnson of "all gone" before pulling away from the bridge (R. 55, 65-66). Both the mate and the captain admit that while they heard someone holler "all gone", they did not know that it was Johnson, and furthermore, Captain O'Brien admits that it could have been one of the bridgemen (R. 28-29, 55-56, 71, 92). The "all gone" signal is not only used by the floatman (Johnson) but also by bridgemen (R. 45). The mate so stated on direct examination but then changed it under a highly leading question put to him by his employer's counsel (R. 45-46). The jury, of course, had a right to and did accept his first answer. The danger of proceeding ahead until the captain knew that the signal came from Johnson

was forcefully described by Captain Holmes, a tugboat operator in the Harbor of New York, of more than thirty years' experience.

Unlike the long rackline, with an eye that is thrown off by a bridgeman (R. 22-23), the short rackline is actually tied around the bitts by snake loops, or turns (R. 54), which required Johnson to unwind the line (R. 82-83). There being no eyewitnesses, no one knows of course, at what moment in the process of unwinding, the float started to pull ahead. Without actually knowing that Johnson was in a position of safety, the danger in starting to pull away from the bridge is that the man on the line may get tangled up in the line, either by getting his hands or his feet caught, and thereby fall overboard (R. 82-83).

The negligence charged was that it was the captain's duty to ascertain the author of the "all gone" signal by sending a man over to where he could have a clear view of the floatman, before starting to pull out, and that he failed to do. That was only a matter of a few feet as can be seen from the photographs (R. 146, 148). This procedure was not only customary (R. 79, 80, 81-83), but nothing novel nor unusual (*Southern Ry. Co.* v. *Hermans*, 44 F. 2d 366, 64 F. 2d 237; C. C. A. 4th Cir.).

Johnson was missed from the float, according to the mate, after the floats cleared the short rack, which means after they had pulled away from bridges 11 and 12, some 50 or 60 feet (R. 36). That Johnson had succeeded in clearing the short rackline on the 53 was conceded (R. 70) Furthermore, the Court of Appeals found that it was a fair inference that he had loosed the short rackline on the 58 because the float was pulled out without breaking it (Opin., R. 175). It was petitioner's claim that while Johnson was engaged in that operation on the 58, and before he had entirely completed clearing the line, he was caught by his line by the starting of the float, away from the bridge, thrown forward, struck his head, as was indicated by the mark on his forehead, and thrown into the water right at the point where the float was pulled away from the bridge (R. 97, 101). His body was found floating

within a distance of some 3 feet from bridge 12 (R. 45) where the 58 had been secured.

Captain O'Brien's knowledge that Johnson was not on the float, was indicated when he directed the mate to do that part of Johnson's job which required him to secure the two floats to each other by a line at the port bitts (R. 36-37). With strange cynicism the tug proceeded ahead, completed the operation of securing the floats at the Gates pier, some 500 feet away, then returned (R. 60). A search was then instituted for Johnson and his body was found floating at bridge 12. Attempts at resuscitation failed, and the death was ascribed to drowning (R. 45, 152).

The only issues submitted to the jury by the District Court were whether or not it was negligent for Captain O'Brien to pull away without ascertaining the author of the signal "all gone", and whether that negligence caused Johnson's death (R. 137-139, 162). The jury found a verdict for the plaintiff, thereby finding both these issues in favor of petitioner.

The Court of Appeals accepted the jury's finding of negligence. On the other hand, the Court decided as a matter of law that despite such negligence, the jury was not warranted in finding causal relationship, stating that it was more likely that Johnson gave the signal and then for some unknown cause fell from the float.

It is petitioner's contention that not only is the question of causal relationship peculiarly a question for the jury, but in the instant case, the Court of Appeals substituted its conjecture of what happened at the fatal moment, and was able to do so only by disregarding the testimony from which the jury had a right to and did adduce that Johnson did not give the signal, but that it was given by a bridgeman.

The Court agreed with the jury's verdict that it was a proper inference to find that Johnson was actually on the float, and that he came to his death by falling therefrom. In coming to its conclusion, that it must have been Johnson that gave the signal and not a bridgeman, the Court not

only went outside of the record, but actually disregarded the testimony. Neither the captain nor the mate said that Johnson gave the signal. In basing its conclusion that it was most likely Johnson that gave it, the lower court found comfort in the testimony to the effect that no witnesses *"observed"* any bridgemen there.

The Court's conclusion is a non sequitur. It overlooked that in operations of this kind, the men on the tug become so accustomed to the presence of people on shore, that they pay very little attention to them, and the mere fact that they did not *see* bridgemen, does not preclude the fact that they were there. Captain O'Brien specifically stated:

> "Q. Well, look, there are bridgemen there, whether you see them or not, aren't there? A. Yes" (R. 92).

Gaglio, the mate, testified that the reason he did not see any bridgemen was that he was walking in the other direction (R. 42). That the more reasonable inference is that a bridgeman gave that fatal signal is buttressed by uncontradicted testimony. O'Brien stated that he did not know whether or not the signal was given by a bridgeman (R. 64-65); that Johnson's normal duties involved removing only the short racklines and not the long racklines (R. 68)—therefore, there must have been a bridgeman present, because otherwise the floats could not have been moved away without the removal of the long racklines; that it is the duty of the bridgeman to throw off the long racklines (R. 21-22); and that it may well have been a bridgeman who shouted "all gone" (R. 92).

Furthermore, Johnson was an experienced man. He knew the danger of giving the "all gone" signal while he was still unloosening the short rackline. There is always a presumption that the deceased did not act negligently. *Tenant* v. *Peoria & P. Ry. Co.*, 321 U. S. 29, at page 34. The Court below would destroy that presumption by its unreasonable inference that Johnson deliberately or negligently put himself into a position of danger by giving the

signal before he was ready. The Court says that he may have stumbled. That is a possibility—but it was for the jury to say whether that was brought about by the negligent operation of the tug at a time when it had no right to start pulling the float away from the bridge, until the captain had learned the identity of the author of the signal.

As against that strained inference by the Court of Appeals the jury had ample evidence to support its finding of cause and effect.

It is not at all essential that the facts and circumstances should *compel* an inference of causal connection, but rather that they *permit* such an inference.

The Court of Appeals failed to give consideration on the question of causal relationship that on appeal the appellate court must consider the evidence from the strongest viewpoint of the successful party below, and give that party the advantage of every fair and reasonable intendment which the evidence could justify. All inferences that reasonably may be drawn from the evidence must be resolved in the plaintiff's favor. *Myers* v. *American Well Works* (C. C. A. 4th Cir.), 114 F. 2d 252, 253; *Nielsen* v. *Richman* (C. C. A. 8th Cir.), 114 F. 2d 343, 345; *Gunning* v. *Cooley*, 281 U. S. 90; *Tennant* v. *Peoria, etc.*, supra.

The Appellate Court is not free to set aside a jury verdict merely because the jury could have drawn different inferences or conclusions, or that the Court regards another inference as more reasonable. *McLeod* v. *Union Barge Line*, 95 F. Supp. 366.

The very argument by the Court below that it was "equally reasonable" to infer that Johnson gave the signal and not a bridgeman, answers itself. If both inferences could be adopted, then it certainly is an invasion of the jury's function by the Court adopting one of equally reasonable inferences and excluding the other. There is no justification, in reason or authority, that compelled the jury to accept the other "equally reasonable" inference that the

Court of Appeals adopted. This Court in *Wilkerson* v. *McCarthy*, 336 U. S. 53, criticized such an attempt as an "independent resolution of conflicting testimony", and in *Tennant* v. *Peoria & P. Ry. Co.*, supra, at page 35, the Supreme Court in referring to such an inference by the appellate court, said that it suffered from the same lack of direct proof as characterizes the one adopted by the jury.

It is axiomatic that in death cases, where there are no eyewitnesses, there is great difficulty in proving cause and effect. The Courts have taken a realistic view of that difficulty, and have uniformly held that the perplexing problem of causal relationship may be properly found by a jury from known facts, even if such deductions may involve speculation and conjecture.

In *Lavender* v. *Kurn*, 327 U. S. 645, the Supreme Court of Missouri had reversed a jury verdict for the plaintiff, holding that it was mere speculation and conjecture to say that deceased was struck by a mail hook, and that the plaintiff had failed to offer proof to warrant the inference of causal connection (354 Mo. 196). This Court reversed and held that such holding was "an undue invasion of the jury's historic function", and that all jury verdicts necessarily involve speculation and conjecture.

In *Tiller, Ex.* v. *Atlantic Coast Line R. Co.*, 318 U. S. 645, the defendant had urged that cause of death was speculative and conjectural. A motion for a directed verdict for the defendant was granted and affirmed by the Circuit Court of Appeals (128 F. 2d 420). That Court had held that the deceased, in putting himself in a position of danger, during a switching operation, negated the conclusion of negligence. This Court held that the jury should be permitted to weigh the evidence of negligence, contributory negligence and the comparative rule, and thereby "do justice to all concerned" (p. 65).

In *Tennant, Adm'x* v. *Peoria & Pekin Union Ry. Co.*, supra, the plaintiff had a verdict. The Circuit Court of Appeals for the Seventh Circuit reversed (134 F. 2d 860)

holding, as in the instant case, that there was no substantial proof that the negligence of the railroad was the proximate cause of Tennant's death, and directed a verdict for the defendant. This Court granted certiorari "because of the important problem as to petitioner's right to a jury determination of the issue of causation". There also, there were no eyewitnesses. This Court in reversing, reiterated fundamental principles that are peculiarly pertinent to the instant case. The Court held that there is a presumption that the deceased was actually engaged in the performance of his duties and exercised due care for his own safety at the time of his death (p. 34). The Court below found other inferences inconsistent with the jury verdict. This Court said that these inferences "suffer from the same lack of direct proof as characterizes the one adopted by the jury" (p. 35). In the instant case, there was direct proof that a bridgeman may well have issued the important signal, particularly in view of the fact that there was no proof that Johnson did.

In *Pollard* v. *Seas Shipping Co., Inc.* (C. C. A. 2d), 146 F. 2d 875, Circuit Judge Clark held that in actions under the Jones Act the right to jury trial should not be invaded. The mere fact that the case was close on the issue of negligence as a proximate cause of death did not justify either the District Court or the appellate court in usurping the functions of the jury. Similarly in the case of *Sadler* v. *Pennsylvania Railroad Co.*, 159 F. 2d 784, where there were no eyewitnesses, and the seaman fell to his death between two barges, the Circuit Court of Appeals of the Fourth Circuit, by Circuit Judge Parker, held that it is for the jury to draw any inferences that could be reasonably drawn and that it is elementary that proximate cause need not be established by direct evidence.

Bearing in mind that Johnson's body was found only 3 feet away from where the float had been secured to the bridge, and in view of the Court of Appeal's finding that he fell from that float, it becomes clear that that is the

point where the negligence occurred. The only reasonable conclusion then is that that negligence was the cause of death. *Johnson* v. *Griffiths S. S. Co.*, 150 F. 2d 224, at page 226. The very essence of the jury's function is to select from among conflicting inferences and conclusions that which it considers the most reasonable. *Tennant* v. *Peoria & P. Ry. Co.*, supra, at page 35. Nor can any contributory negligence on Johnson's part negate the inference that his death was due to respondent's negligence. *Tennant* v. *Peoria & P. Ry. Co.*, supra, at page 35. The lower Court's finding is a finding of negligence in a vacuum. The jury, on the other hand, did not act in a vacuum. In view of the fact that there is a presumption that the deceased was not guilty of contributory negligence; that he was actually on the float at the time; that the float pulled away when the captain did not know whether it was the floatman that gave the signal authorizing him to pull away; that his body was found right at the bridge to which the float had been secured, it certainly was not a strained inference on the part of the jury to find that the negligent pulling away caused Johnson's death.

Of course there was no certainty to this. Litigated issues are seldom established to a certainty. Generally, the quest for certainty is vain and futile, or, as stated by Judge Cardozo, the law contents itself with probabilities and declines to wait for certainty before drawing its conclusions. *Lewis* v. *Ocean Accident and G. Corp.*, 224 N. Y. 18, 21-22.

That the float was pulled away from the bridge negligently, is a circumstance found by everybody. The inferences to be drawn from that circumstance need not be certain or incontrovertible. Different minds may well come to different conclusions. That is why it is for the jury to decide and not the Court. *Hart* v. *Hudson River Bridge Co.*, 80 N. Y. 622. It is equally well established that proof of defendant's negligence does not mean that plaintiff's evidence must exclude or eliminate every other possible cause or point out the particular act or omission which

caused the injury. *Rosenberg* v. *Schwartz*, 260 N. Y. 162, 166; *White* v. *Lehigh Valley R. R. Co.*, 220 N. Y. 131; *Ingersol* v. *Liberty Bank*, 278 N. Y. 1.

(2) The Court of Appeals failed to give due weight to the declared policy of this Court that in cases under the Federal Employers' Liability Act and Jones Act the right of trial by jury should be particularly guarded.

Congress, in the Jones Act (46 U. S. C. Sec. 688), adopted the same standard of care as was provided for under the Federal Employers' Liability Act (Appendices A and B). That act specifically provides that the carrier shall be liable if the negligence "in whole or in part" contributed to the injury or death. The right of trial by jury should be just as zealously guarded in actions by seamen under the Jones Act as it is in the F. E. L. A. cases. If anything, by virtue of the nature of their work, it should be more so. It was pointed out by this Court that the Jones Act enlarged the remedies heretofore available to seamen. *Panama Railroad* v. *Johnson*, 264 U. S. 375; *Garrett* v. *Moore-McCormack*, 317 U. S. 239.

There have been many cases here, where this Court announced again and again its declared policy in F. E. L. A. cases. Succinctly stated, it has been said that to deprive railroad workers of the benefit of a jury trial in close or doubtful cases, is to take away a goodly portion of the relief which Congress has afforded them. *Bailey* v. *Central Vermont Ry.*, 319 U. S. 350; *Blair* v. *Baltimore & Ohio R. R.*, supra; *Wilkerson* v. *McCarthy*, supra.

This Court even overruled a long-established doctrine in preserving a seaman's right to a jury trial. *Jacob* v. *New York City*, 315 U. S. 752. It was the so-called "simple tool doctrine" under which the Courts have exonerated employers from liability in the furnishing of tools that were simple, upon the theory that the employee has as much, if not greater opportunity, in discovering defects. This Court refused to apply that doctrine to seamen.

In its effort to preserve the jury trial, the Supreme Court in a case not involving death, held that the question of causal connection was one for the jury, and overruled the holding of the Court of Appeals for the Fifth Circuit (170 F. 2d 719). That was in the case of *Carter* v. *Atlanta, etc., Ry. Co.*, 338 U. S. 430. The Court held that if the injury to the railway employee resulted "in whole or in part" from defendant's negligence or its violation of the Safety Appliance Act, then it is a question for the jury to determine as to whether causal relationship existed. In *Corey* v. *Southern Pacific R. Co.*, 335 U. S. 520, the Court held that the jury may determine whether the negligent breach is "a contributory proximate cause".

Here, the lower Court invaded the jury's exclusive function. Congress has chosen the jury as the proper tribunal to assess and evaluate the facts. *Bailey* v. *Central Vermont Ry. Co.*, supra, at page 354, and *Berry* v. *U. S.*, 312 U. S. 450.

By substituting its findings for that of the jury, the lower Court not only deprived Johnson's widow and two children of the benefit of the verdict awarded to them, but the Court of Appeals' decision, if permitted to stand, will lead to great confusion on the question of causal relationship in seamen's death cases where there are no eye witnesses. Time and again fatal accidents occur without the presence of witnesses. There are many cases such as *Casey* v. *American Export Lines*, 173 F. 2d 324; *Pollard* v. *Seas Shipping Co., Inc.*, supra; *Larsen* v. *U. S.*, 72 F. Supp. 137 and *Johnson* v. *Griffiths S.S. Co.*, supra, where causal connection was based entirely upon inference. Many of these accidents in which claims are prosecuted, are never officially reported. The decision of the lower Court will tend to undermine the forward steps of liberal construction of this Court in *Jones Act* and *F. E. L. A.* cases.

(3) The Court of Appeals erred in failing to order a new trial under Rule 50b of the Federal Rules of Civil Procedure, in contravention of this Court's interpretation.

The defendant, at the trial, took the following procedural steps: At the end of the plaintiff's case it moved to dismiss, and decision on that motion was reserved by the District Court (R. 102, 105). At the end of the entire case it renewed the motion to dismiss and also asked that the Court direct a verdict in its favor upon two grounds and only those.

1. That there was no proof of negligence, and
2. That the deceased himself was responsible for his own death.

Again, decision was reserved (R. 133, 134). The jury returned a verdict in favor of the plaintiff, and the defendant then moved to set aside the verdict "on the ground that it is contrary to the law and contrary to the evidence and contrary to the weight of the evidence and excessive". The Court decided the question of excessiveness by overruling it, but again reserved decision on the motion (R. 145).

Rule 50b (Appendix C, infra, p. 19) specifically states that "Within 10 days after the reception of a verdict, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict." No such motion was ever made.

Nevertheless, the Court of Appeals in its mandate ordered the District Court to direct a verdict for the defendant.

This Court dealt with Rule 50b in the following oft-quoted cases:

In *Halliday* v. *U. S.*, 315 U. S. 94, the defendant moved for a new trial, but failed to move for judgment n. o. v. The motion was denied. On appeal, the Court of Appeals rendered final judgment for the defendant. The Supreme

Court reversed, holding that there was sufficient evidence to support the verdict, but did not reach the problem of the failure of the defendant to move for judgment under Rule 50b. In *Conway* v. *O'Brien*, 312 U. S. 450, the defendant had moved for a directed verdict at the close of the evidence, but failed to move for judgment under Rule 50b. Nevertheless, the Circuit Court of Appeals, Second Circuit (111 F. 2d 611), reversed and ordered the complaint dismissed. This Court granted certiorari, but again did not rule on the question of procedure, but reversed solely on the ground that the Trial Judge had properly submitted the case to the jury.

In *Berry* v. *U. S.*, 312 U. S. 450, there was again raised the question whether a motion for judgment n. o. v. was necessary to enable the appellate court to dismiss rather than remand for a new trial. But here again this Court failed to reach the question because it found that the judgment of dismissal by the Court of Appeals should be reversed because there was sufficient evidence for the jury, and to sustain the judgment for the plaintiff.

This Court finally reached the question squarely in *Cone* v. *West Virginia Pulp and Paper Co.*, 330 U. S. 212. In that case, as in the instant case, the defendant failed to move for a judgment, notwithstanding the verdict, and the Court held that the respondent, having failed to submit such a motion, the appellate court was without power to direct the District Court to enter judgment contrary to the one it had permitted to stand.

Upon the authority of that case, this Court made a similar decision in *Globe Liquor Co.* v. *San Roman*, 332 U. S. 571, where both parties had moved for a directed verdict, but the losing party had failed to move for a judgment under the rule.

In the case of *Garman* v. *Metropolitan Life Insurance Co.* (U. S. Court of Appeals, Third Cir., 1949), 175 F. 2d 24, the Court of Appeals found that the motion for a directed verdict for the defendant, made at the conclusion of the entire case, should have been granted, but because

of the failure to make such a motion after judgment, the Court felt constrained to remand the case back to the District Court for a new trial.

In the instant case, the failure to order a new trial is not at all of academic interest to the petitioner. In the trial of the case, there were two additional issues urged in the District Court, but both of them were overruled by that Court and not submitted to the jury. One was the question as to whether or not the defendant was negligent in failing to attempt to rescue Johnson after they found he was missing (R. 29-30, 83-85). A proper exception was taken to such refusal to submit that issue to the jury (R. 133-134). Furthermore, the District Court failed to permit evidence which would have indicated that the car float 53 upon which Johnson and the mate had stepped, was covered with oil (R. 38). That factor may well have been a contributing cause to his death. We believe that the District Court improperly held that that issue was not sufficiently pleaded in view of the allegations in the complaint that the defendant failed to furnish Johnson with a safe place in which to work (R. 5, 38). Failure to order a new trial, in any event, was a real deprivation of the rights of the petitioner. Nevertheless, we earnestly urge and suggest that this Court review particularly the issue as to whether or not the lower Court did deprive petitioner of a jury trial on the issue of causation.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this Court should exercise its right of review and grant this petition for a writ of certiorari.

Respectfully submitted,

JACQUIN FRANK,
Counsel for Petitioner.

APPENDIX A

Section 688 of The Jones Act provides:

"§ 688. *Recovery for injury to or death of seaman.*

Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located. Mar. 4, 1915, c. 153, § 20, 38 Stat. 1185; June 5, 1920, c. 250, § 33, 41 Stat. 1007."

APPENDIX B

Section 51 of the Federal Employer's Liability Act provides:

"§ 51. *Liability of common carriers by railroad, in interstate or foreign commerce, for injuries to employees from negligence; definition of employees.*

Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or in case of

the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or *death resulting in whole or in part from the negligence* of any of the officers, agents or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment. Apr. 22, 1908, c. 149, § 1, 35 Stat. 65; Aug. 11, 1939, c. 685, § 1, 53 Stat. 1404." (Emphasis ours.)

APPENDIX C

The Federal Rules of Civil Procedure Provide in Rule 50 (b):

"Rule 50.(b). *Reservation of Decision on Motion.*

Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Within 10 days after the reception of a verdict, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict; or if a verdict was not returned such party, within 10 days after the jury has been discharged, may move for judgment in accordance with his motion for a directed verdict. A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative. If a verdict was returned the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed. If no verdict was returned the court may direct the entry of judgment as if the requested verdict had been directed or may order a new trial."

LIBRARY
SUPREME COURT, U.S.

Office - Supreme Court, U. S.
FILED
SEP 13 1952
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1952

No. 40

MARGARET JOHNSON, as Administratrix of the goods, chattels and credits of CHARLES JOHNSON, deceased,

Petitioner,

v.

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD CO.

BRIEF FOR PETITIONER

JACQUIN FRANK,
Counsel for Petitioner.

INDEX

	PAGE
The Opinions of the Courts Below	1
Jurisdiction	1
Question Presented	2
Statutes Involved	3
Statement of the Case	3
The Custom	6
The Procedural Steps in the District Court	11
Specification of Errors	12
Summary of Argument	13
The Purpose of Rule 50(b)	15
Argument	18
The Effect of the Defendant's Failure to Comply With the Rule	24
The Proper Procedure	26
Conclusion	27

CASES CITED

Adams v. U. S. (C. C. A. 7th, 1940), 116 F. 2d 199	26
Atlantic Greyhound Corp. v. McDonald (C. C. A., 4th Cir.), 1942, 125 F. 2d 849	11
Bailey v. Central Vermont Ry. Co., 319 U. S. 350	17
Baltimore and Carolina Line v. Redman (1935), 295 U. S. 654	13, 14, 18, 19
Berry v. U. S., 312 U. S. 450	21
Binder v. Commercial Travelers, etc., 165 F. 2d 896	25

PAGE

Cone v. West Va. P. & P. Co., 330 U. S. 212 ..... 16, 20, 23, 24, 25

Conway v. O'Brien, 312 U. S. 492 21

Fountain v. Filson, 336 U. S. 681 24

Garman v. Metropolitan Life Ins. (C. A. 3d) 1949, 175 F. (2d) 24 25

Globe Liquor Co. v. San Roman (1947), 332 U. S. 571 ..... 23, 24

Gunning v. Cooley, 281 U. S. 90 10

Halliday v. U. S., 315 U. S. 94 21

Lavender v. Kurn, 327 U. S. 645 17

Marsh v. Illinois Cent. R., 175 F. 2d 498 26

Mass. Mut. Life Ins. Co. v. Smith, 193 F. 2d 511 26

McLeod v. Union Barge Line, 95 F. Supp. 366 10

Meyers v. American Well Works (C. C. A., 4th Cir.), 114 F. 2d 252 10

Missouri Pacific R. Co. v. Baldwin (C. C. A. 8th) 1941; 117 F. 2d 510 24

Montgomery Ward v. Duncan, 311 U. S. 243 ..... 24, 25, 26

Mt. Adams and E. P. Inclined R. Co. v. Lowery (C.C.A. 6th, 1896), 74 F. 463 26

Nielsen v. Richman (C. C. A., 8th Cir.), 114 F. 2d 343 10

Pollard v. Seas Shipping Co., 146 F. 2d 875 8

Raudenbush v. Baltimore and Ohio Railroad, 63 F. Supp. 329, 160 F. 2d 363 26

Sadler v. Pennsylvania R. R. Co., 159 F. 2d 784 8

Slocum v. New York Life Insurance Co. (1913), 228 U. S. 364 ..... 13, 14, 18, 19

PAGE

Southern Ry. Co. v. Hermans, 44 F. 2d 366, 64 F. 2d 237 (C. C. A., 4th Cir.) 7

Tenant v. Peoria Pekin Union Ry. Co., 321 U. S. 29 ..... 8, 9, 10

Texas v. Guidry, 9 S. W. 2d 284, aff'd 280 U. S. 531 17

Tiller, ex. v. Atlantic Coast Line R. Co., 318 U. S. 645 17

Venides v. United Greek etc., 168 F. 2d 681 26

Virginia, etc. v. Dunbar, 106 F. 2d 383 11

Wilkerson v. McCarthy, 336 U. S. 53 17

STATUTES AND AUTHORITIES

Federal Rules of Civil Procedure:

Rule 50(b) 2, 3, 10, 11, 12, 14, 15, 17, 18, 20, 21, 22, 23, 24, 25, 27

Jones Act (46 U. S. C. 688) 1

Michigan Law Review (1935), Volume 34, pages 93 to 100 ..... 13, 14

Moore's Federal Practice, 2nd Ed., Vol. 5 ..... 9, 15, 16, 25, 26

Scott, Trial by Jury in the Reform of Civil Proceedure, 31 Harv. L. Rev. 669 (1918) 13

Thayer, Judicial Administration, 63 U. of Pa. L. Rev. 585 13

Thorndike's Trial by Jury in the United States Courts, 26 Harv. L. Rev. 732 (1913) 13

28 U. S. C. 1254(1) 2

IN THE

Supreme Court of the United States

OCTOBER TERM, 1952

No. 40

MARGARET JOHNSON, as Administratrix of the goods, chattels and credits of CHARLES JOHNSON, deceased,

Petitioner,

v.

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD CO.

BRIEF FOR PETITIONER

The Opinions of the Courts Below

The District Court for the Eastern District of New York, by Judge MATTHEW T. ABRUZZO, filed an opinion on June 20, 1951, which is not reported (R. 159-164).

The opinion of the United States Court of Appeals for the Second Circuit was filed on February 4, 1952, and is reported in 194 F. 2d 194 (R. 171-175).

Jurisdiction

The action was brought under the Jones Act (46 U. S. C. 688), claiming damages for wrongful death.

The judgment of the Court of Appeals was entered on February 4, 1952. The petition for a writ of certiorari was filed on April 22, 1952, and it was granted on June 9, 1952. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

Question Presented

Where the plaintiff had a verdict in an action under the Jones Act for wrongfully causing death, the question presented is:

> Whether the plaintiff can be deprived of a jury trial by the Court of Appeals reversing the judgment entered upon plaintiff's verdict and directing a verdict for the defendant, although the defendant had failed to move for judgment notwithstanding the verdict under Rule 50(b) of the Federal Rules of Civil Procedure.

The petitioner, in her application for a writ of certiorari, prayed for a reversal and reinstatement of the jury verdict upon the ground that the Court of Appeals erred in holding as a matter of law that there was insufficient evidence of causal relationship between the negligence found by it and the death of the deceased. She also contended that the Court of Appeals erred in reversing the judgment and directing a judgment for the defendant in violation of Rule 50(b) of the Federal Rules of Civil Procedure.

This Court in granting certiorari limited the issues to the application of Rule 50(b).

Statutes Involved

The Federal Rules of Civil Procedure provide in Rule 50(b):

"Rule 50(b). *Reservation of Decision on Motion.*

Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. *Within 10 days after the reception of a verdict, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict;* or if a verdict was not returned such party, within ten days after the jury has been discharged, may move for judgment in accordance with his motion for a directed verdict. A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative. *If a verdict was returned the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed.* If no verdict was returned the court may direct the entry of judgment as if the requested verdict had been directed or may order a new trial." (Italics ours.)

Statement of the Case

The applicability of the above rule cannot properly be evaluated without a statement of the case and the various procedural steps taken in the District Court. It is also essential to put in its proper context the action of the Court of Appeals in erroneously directing a verdict for the defendant.

This action was brought under the Jones Act on behalf of the widow and children of a merchant seaman for wrongful death.

The facts giving rise to the cause of action are as follows:

Petitioner's intestate, Charles Johnson, came to his death by drowning while employed by respondent, The New York, New Haven and Hartford Railroad Co., while acting as a floatman on defendant's tug "Transfer #10", while the tug with its captain and crew was engaged in removing two empty car floats from slips or bridges maintained by the respondent at Oak Point in the East River in the Borough of Bronx, City and State of New York (R. 11-12). Johnson was found to be missing shortly after the car floats were moved away from their slips or bridges. Nevertheless, the tug and car floats proceeded to their destination some 500 feet away, and then, upon their return, 25 minutes later, the captain and the mate began to search for Johnson and found his body floating some 3 feet away from the very bridge to which one of the car floats had been originally secured (R. 44, 45, 46).

The case was tried before District Judge MATTHEW T. ABRUZZO and a jury on April 10, 1951, and resulted in a verdict for the plaintiff in the sum of $20,000 on April 13, 1951, and a judgment on the verdict was entered in the United States District Court, Eastern District of New York, on April 13, 1951.

The complaint originally alleged negligence in the operation of the tug and tow and also alleged negligence for failure to furnish Johnson with a "safe and secure place in which to work" (R. 5). Upon the trial, the complaint was amended by further alleging defendant's negligence for the failure of the captain to use reasonable efforts and care in attempting to rescue plaintiff's intestate when he was found to be missing from the float (R. 9). The District Judge refused to submit the question of "safe place" and the failure to exercise reasonable care in attempting to rescue petitioner's intestate, but confined the issue submitted to the jury solely to the negligence in the manner in which the tug and floats were operated by Johnson's fellow servants, the captain and the mate (R. 133-134). The accident occurred on April 22, 1946, during the

maneuver of removing the floats from bridges 11 and 12. The transcript of record opposite pages 146 and 148 shows photographic reproductions of both floats, #53 and 58, as well as the two bridges or slips involved in the accident. Car float 53 was secured to bridge 11 and car float 58 to bridge 12, and each one of them was lying bow in (R. 17). The car floats are 340 feet in length and 40 feet wide. Between the two bridges 11 and 12 is a pier about 50 feet long, referred to in the testimony as the "short rack". On the outer side of the two bridges were two piers known as "long racks", and the two floats were secured to the short rack by lines called "short racklines" and to the long pier or long rack by long racklines (R. 17, 18, 19, 21-22).

All the factual testimony was given by the captain and the mate. Both of them were still in the employ of the defendant at the time of the trial and both of them were charged with negligence in the operation. Nevertheless, plaintiff was constrained to use their testimony in establishing her case. From both of these witnesses the operation involved was fully developed.

When the tug came alongside of float 53, the mate and Johnson, the floatman, stepped aboard that float. The mate's duty required him to remain at the stern preparatory to throwing a line across the two floats at the stern. Johnson walked towards the bow, where he was to perform certain acts (R. 17-18). That was the last time he was seen alive. He was required to remove the short rackline at the port bow of the 53. Apparently he did so. He then was required to step across between the two bridges and board the 58 to perform a similar operation, i.e., remove the short rackline on the 58 where it was secured to bridge 12 (R. 18, 20-21, 25).

It is true that the short rack seen on photograph Plaintiff's Exhibit 2, opposite page 148 of the record, obstructs the captain's view of Johnson when he is unloosening the short rackline at bridge 12. The captain therefore awaits a signal from him indicating that the line or lines are gone. The customary signal is "All gone". Then he proceeds ahead (R. 55, 65-66, 70).

The entire controversy in both district court as well as in the court of appeals, seemed to hinge upon whether or not that signal of "all gone" was given by Johnson or by a "bridgeman". The only witnesses, the captain and the mate, testified that *they did not recognize Johnson's voice.* Both admitted that while they did not *see* bridgemen present, one of the bridgemen may well have given the signal (R. 28-29, 55-56, 71, 92). The "all gone" signal is not only used by the floatman (Johnson) but also by bridgemen (R. 45). The mate so stated on direct examination but then changed it under a highly leading question put to him by his employer's counsel (R. 45-46). The jury, of course, had a right to and did accept his first answer.

The Custom

The captain, although he did not recognize the author of the signal, nevertheless started ahead with the floats. The danger of proceeding ahead before the captain knew that the signal came from Johnson was forcefully described by Captain Holmes, a tugboat operator in the Harbor of New York, of more than thirty years' experience (R. 75-76).

Unlike the long rackline, with an eye that is thrown off by a bridgeman (R. 22-23), the short rackline is actually tied around the bitts by snake loops, or turns (R. 54), which required Johnson to unwind the line. There being no eyewitnesses, no one knows, of course, at what moment in the process of unwinding, the float started to pull ahead. Without actually knowing that Johnson was in a position of safety, the danger in starting to pull away from the bridge is that the man on the line may get tangled up in the line, either by getting his hands or his feet caught, and thereby fall overboard (R. 82-83).

The Court of Appeals in its opinion stated that it was a legitimate inference that Johnson went ashore and crossed over to the 58 and "had at least loosed the short rackline, since the float was pulled out without breaking it". It also

agreed that it is "a more reasonable inference that he accidentally fell from the 58" (194 F. 2d 194, 197).

The negligence charged was that it was the captain's duty to ascertain the author of the "all gone" signal by sending a man over to where he could have a clear view of the floatman before starting to pull out, and that he failed to do so.

The only issue submitted to the jury was whether or not there was a well-recognized custom, under the circumstances here, that the captain was bound to conform with (R. 134). The plaintiff by competent testimony showed that where the captain does not recognize the author of the signal and cannot see him it is customary to send someone over in a position where he could look down towards the boy, here the mate, and find out whether it was safe to proceed (R. 79, 80, 81-83). The float is only forty feet wide and the mate could easily have walked over to a point where he could see Johnson and ascertain whether or not *he* gave the signal (R. 81). That was only a matter of a few feet, as can be seen from the photographs (R. 146, 148). This procedure was not only customary (R. 79, 80, 81-83) but nothing novel nor unusual (*Southern Ry. Co.* v. *Hermans*, 44 F. 2d 366, 64 F. 2d 237 (C. C. A., 4th Cir.). The defendant denied the existence of such a custom but admitted, through its expert, that under certain conditions it is necessary to ascertain the position of the floatman (R. 115-116). The jury by its verdict found that there was such a well-recognized custom which was violated by the captain and that such violation caused Johnson's death.

The Court of Appeals, on the other hand, although it accepted the district court's findings of the existence of the custom and the violation thereof, substituted its finding of causal relationship by stating "it is at least equally reasonable to infer that Johnson did give the signal for the tug to start, and thereafter stumbled or for some other unknown cause fell and knocked himself unconscious" (R. 175). Of course, *if it was an equally reasonable inference that Johnson himself gave the signal, and in some way fell,*

then the jury's inference that he did not give the signal, based upon some very cogent testimony, could not and should not be disturbed (*Pollard* v. *Seas Shipping Co.*, 146 F. 2d 875; *Sadler* v. *Pennsylvania R.R. Co.*, 159 F. 2d 784; *Tenant* v. *Peoria-Pekin Union Ry. Co.*, 321 U. S. 29).

While the Court of Appeals made its finding of no causal relationship between the negligence found and the death of Johnson purely on conjecture and on inference unwarranted by the testimony, the jury on the other hand, in connecting the death of Johnson to the unwarranted movement of the floats was amply justified by the record. The Court of Appeals' finding was based entirely upon an erroneous interpretation of all the testimony involving the vital issue as to whether or not Johnson and not one of the bridgemen gave the all-important "all gone" signal. If one of the bridgemen gave it to indicate that his lines were gone, then that was no signal to the captain to go ahead, because Johnson may have been in the very act of unwinding the line from the bitts. Basing its conclusion that it was most likely Johnson that gave it, the lower court found comfort in the testimony to the effect that no witnesses "observed" any bridgemen there (R. 175). The court's conclusion is a *non sequitur*. It overlooked that in operations of this kind the men on the tug (Captain O'Brien and the mate) become so accustomed to the presence of people on shore that they pay very little attention to them, and the mere fact that they did not *see* bridgemen does not preclude the fact that they were there. Captain O'Brien specifically stated:

> "Q. Well, there are bridgemen there whether you see them or not, aren't there? A. Yes" (R. 92).

Furthermore, the mate testified that the reason he did not see any bridgemen there was that he was walking in the other direction (R. 42). On the other hand, that the more reasonable inference is that a bridgeman gave that fatal signal is buttressed by uncontradicted testimony. O'Brien stated that he did not know whether or not the

signal was given by a bridgeman (R. 64-65); that Johnson's normal duties involved removing only the short racklines and not the long racklines (R. 68)—therefore, there must have been a bridgeman present, because otherwise the floats could not have been moved away without the removal of the long racklines; that it is the duty of the bridgeman to throw off the long racklines (R. 21-22); that if Johnson had removed the long racklines, he would have been seen by either the captain or the mate, as both could see the starboard side of the float; and that it may well have been a bridgeman who shouted "all gone" (R. 92).

Furthermore, Johnson was an experienced man. He knew the danger of giving the "all gone" signal while he was still unloosening the short rackline. There is always a presumption that the deceased did not act negligently. *Tenant* v. *Peoria & P. Ry. Co.*, 321 U. S. 29, at p. 34. The court below would destroy that presumption by its unreasonable inference that Johnson deliberately or negligently put himself into a position of danger by giving the signal before he was ready. The Court says that he may have stumbled (R. 175). That is a possibility—but it was for the jury to say whether that was brought about by the negligent operation of the tug at a time when it had no right to start pulling the float away from the bridge until the captain had learned the identity of the author of the signal.

As against that strained inference by the Court of Appeals, the jury had ample evidence to support its finding of cause and effect. It is not at all essential that the facts and circumstances should *compel* an inference of causal connection, but rather that they *permit* such an inference.

The Court of Appeals failed to give consideration on the question of causal relationship that on appeal, in reviewing a judgment n.o.v., the appellate court must consider the evidence from the strongest viewpoint of the successful party below and give that party the advantage of every fair and reasonable intendment which the evidence could justify (Moore's Fed. Pract.—2nd Ed., Vol. 5, pp. 2346-7). All inferences that reasonably may be drawn from the evi-

dence must be resolved in the plaintiff's favor. *Meyers* v. *American Well Works* (C. C. A., 4th Cir.), 114 F. 2d 252, 253; *Nielsen* v. *Richman* (C. C. A., 8th Cir.), 114 F. 2d 343, 345; *Gunning* v. *Cooley*, 281 U. S. 90; *Peoria, etc.*, supra. Rule 50(b) did not change this.

The appellate court is not free to set aside a jury verdict merely because the jury could have drawn different inferences or conclusions or that the court regards another inference as more reasonable. *McLeod* v. *Union Barge Line*, 95 F. Supp. 366. Here the lower court said it was equally reasonable.

Shortly after the floats cleared the rack, Johnson was found to be missing (R. 36). It was still necessary for him to complete his part of the operation by securing the two floats to each other at the bow bitts by a line. Captain O'Brien, not seeing Johnson on board, directed the mate to do Johnson's job (R. 36-37). The tug proceeded ahead, completed its operation some 500 feet away and then returned some 25 minutes later (R. 40, 61). A search instituted for Johnson found his body floating some 3 feet from the apron of the bridge to which the 58 had been originally secured (R. 45, 63). It was the petitioner's contention upon the trial that the question of the failure of the personnel of the tug to attempt to rescue Johnson after it had learned of his absence was an issue of negligence that should be submitted to the jury (R. 29-30, 83-85). The District Court refused, and also refused to submit the question of the failure to furnish a safe place, despite testimony by one of the witnesses that the deck of the float was covered with oil (R. 38). It limited the issues of negligence to the sole question as to whether or not there was a custom which required Captain O'Brien to ascertain the author of the signal "all gone" when his view was obstructed and whether or not the failure to do so caused Johnson's death (R. 137-139, 162).

The jury, on that issue, found a verdict in favor of the plaintiff.

The Procedural Steps in the District Court

The defendant at the trial took the following steps:

At the end of the plaintiff's case it moved to dismiss on the ground that the plaintiff failed to prove negligence, failed to make out a prima facie case, and "failed to put in sufficient proof to avoid the dismissal of the complaint at this stage" (R. 102). The court reserved decision on that motion (R. 105).

At the end of the entire case the defendant renewed the motion to dismiss and also asked the court to direct a verdict in its favor upon two grounds and only those:

1. That there was no proof of negligence.
2. That the deceased himself was responsible for his own death.

Again decision was reserved (R. 133-134).

Under subdivision (a) of Rule 50, the defendant is required to state the specific grounds for his motion for a direction of verdict. The only grounds relied upon by the defendant here was negligence and contributory negligence. On the other hand, the only ground for the reversal of the judgment by the court of appeals was that there was not sufficient evidence as to causal connection between the negligence and the death. That was neither urged nor mentioned as a ground for a direction. The reason for the requirement is well set forth by Circuit Judge Parker (*Atlantic Greyhound Corp.* v. *McDonald* (C. C. A., 4th Cir.), 1942, 125 F. 2d 849, 850, and *Virginia etc.* v. *Dunbar*, 106 F. 2d 383, 385). In the *Virginia* case, Judge Parker stated: "And we think it important that this requirement of the rule be observed, particularly in view of the enlarged powers granted the court with respect to such motions by Rule 50(b), as otherwise judgment might be entered on such a motion after the close of the trial and on a ground which could have been met with proof if it had been sug-

gested when the motion was made. We do not mean to say that technical precision need be observed in stating the grounds of the motion, but merely that they should be sufficiently stated to apprise the court fairly as to movant's position with respect thereto."

Upon the rendition of the verdict in plaintiff's favor, the defendant then moved to set aside the verdict on the ground "that it is contrary to the law and contrary to the evidence and contrary to the weight of the evidence and excessive" (R. 145). The court immediately held that the verdict was not excessive, but again reserved decision on that motion (R. 145). These were the procedural steps taken by the defendant.

Later the District Court sustained the jury verdict (R. 164).

It is petitioner's contention that the District Court had the function of determining under these conditions whether or not to set aside the verdict and have a retrial or to take any other step. That under Rule 50(b), the defendant having failed to move for judgment notwithstanding the verdict, the Court of Appeals could reverse but could not direct a verdict for the defendant.

Specification of Errors

The learned Court of Appeals for the Second Circuit erred in the following respect:

After finding the existence and the violation of the custom which required the captain to ascertain the author of the "all gone" signal and holding that there was no causal relationship between such negligence and the death of Johnson, the court not only reversed but directed that a verdict be entered in favor of the defendant. The Court of Appeals had no power to do so under Rule 50(b).

Summary of Argument

This history of the rule clearly demonstrates that it was born out of the confusion that existed prior to its adoption. The original committee formulating the new federal rules was faced with a not too mild dilemma by two cases in the Supreme Court—*Slocum* v. *New York Life Insurance Co.* (1913), 228 U. S. 364, and *Baltimore and Carolina Line* v. *Redman* (1935), 295 U. S. 654. In the *Slocum* case the Supreme Court found that a Pennsylvania statute as applied in federal courts under the terms of the Conformity Act and which permitted the trial court to render judgment *non obstante veredicto* was violative of the Seventh Amendment of the Federal Constitution. There was a strong dissent by the then Mr. Justice Hughes.

In *Baltimore and Carolina Line* v. *Redman*, supra, the Supreme Court distinguished the *Slocum* decision by holding that whereas in the *Slocum* case the motion made at the end of all the evidence was denied, in the *Redman* case decision on the motion was reserved, and therefore not only the trial court could have set aside the verdict and entered judgment in favor of the aggrieved party, but, on review, the appellate court could do likewise.

In Volume 34 of Michigan Law Review (1935), pages 93 to 100, the confusion that existed is commented upon. Other well-known commentators such as Thorndike in *Trial by Jury in the United States Courts*, 26 Harv. L. Rev. 732 (1913); Thayer, *Judicial Administration*, 63 U. of Pa. L. Rev. 585, 600-601, and Scott, *Trial by Jury in the Reform of Civil Procedure*, 31 Harv. L. Rev. 669, 685 (1918), wrote in a critical vein on the subject involving the motion for judgment n. o. v., as enunciated in the *Slocum* case.

We quote from the following significant language of the Michigan Law Review article supra:

> "While, as has been pointed out, but few states have so far provided by express statute for the reservation system of avoiding new trials, the Supreme Court's

opinion in the *Baltimore & Carolina Line* case gives new hope that this method may be used by state courts as well as by the federal courts without legislative authorization, inasmuch as that decision held that the reservation procedure was authorized by the common law. *Indeed, it is to be expected that a rule regulating this procedure will be incorporated in the new federal rules, now in process of formulation.* Certainly it is also to be hoped that the courts will not prove laggard in heeding the possibilities evident in this decision, and that they may readily adopt this means now at hand in a concentrated effort to effect a reduction in the number of costly and stultifying retrials of jury cases." (Italics ours.)

Rule 50 was promulgated in 1937 and stands now as originally adopted. *Prior* to the adoption of the Federal Rules of Civil Procedure, a trial court had certain powers that were recognized either by state statutes within the state where the federal court was located or by common law. It could set aside a verdict and either direct a new trial on the ground of error in the admission of evidence or on the ground that the verdict was against the weight of evidence. It could also direct entry of judgment notwithstanding the verdict on the ground that there was insufficient evidence to support the verdict. But this could be done only if the litigant was careful to move for a directed verdict at the close of the evidence and to *expressly* give the trial court the right to reserve decision on the motion and thereafter (after the verdict) move for judgment notwithstanding the verdict.*

---

* *Slocum* v. *New York Life Insurance Co.*, supra; *Baltimore & Carolina Line* v. *Redman*, supra, commented upon infra.

The Purpose of Rule 50(b)

The purpose of the rule was to relieve the strict requirement of an express reservation on the ruling on a motion for a directed verdict and the post-verdict motion for judgment n. o. v. The reservation was made automatic, and the litigant was given a 10-day period in which to move for judgment n. o. v. or for a new trial or both.

But the necessity for still moving for a directed verdict and for judgment n. o. v. not only remained but was specifically provided for by Rule 50(b) (Moore's Fed. Pr. 2nd Ed. Vol. 5, pp. 2327, 2333). Motion for judgment n. o. v. could not be dispensed with because it was important that the trial judge, close to the case, should have in the first instance the opportunity to evaluate what error, if any, he had made during the trial, as well as to evaluate the entire testimony. If he decided that there was no substantial error, or that the testimony was of the necessary weight and sufficiency, he could allow the judgment to stand. If he decided there was error in admission of the evidence, or for some other reason, he could order a new trial. If he felt that the error went to the root of the case, i.e., insufficiency of the evidence to support the verdict, and that he should have directed a verdict, he may do so, providing a motion had been made for judgment notwithstanding the verdict. He may then set aside the verdict and enter judgment for the moving party. This is more than a technical requirement. It goes to the very heart of the litigant's right to a jury trial. It is a salutary and beneficial rule, tending, if anything, to avoid unnecessary retrials. It gives the trial court the opportunity to re-examine the case with calmness and deliberation instead of during the stress and strain of a lengthy jury trial.

The trial judge, since the adoption of the rule, can only exercise all of these three alternatives when the litigant complies with the rule, i.e., moves within 10 days after the rendition of the verdict for judgment n. o. v. Otherwise,

he is restricted to either sustaining the verdict or ordering a new trial. By what right then may an appellate court on the cold record set aside a verdict and direct judgment for the party who by his own omission has failed to give the trial judge the opportunity to act in the first instance? (Moore, supra, p. 2333.)

The vital necessity of giving the district courts an opportunity in the first instance to act upon the verdict is perhaps best illustrated in this very case. Let us assume that upon reconsideration and deliberation the trial court comes to the conclusion that there was a gap in the evidence that could be supplied. He may then order a new trial (*Cone* v. *West Va. P. & P. Co.*, 330 U. S. 212, 217).* On the other hand, during the calm deliberation he may have also concluded that he committed error in limiting the issues submitted to the jury. He may come to the conclusion that he should have submitted the question of the unsafe place due to the accumulation of oil on the float which may well have caused Johnson to slip from the float, or even the failure to make an attempt to rescue Johnson after he had fallen from the float. Under the circumstances, he had a right to set aside the verdict and order a new trial. All of that right was specifically granted to him under the rule. If he was in error in any steps he took, then the reviewing court could correct the error made by him. The reviewing court could not under the rule go further than the district court under the motion as made in this case after the verdict. The Court of Appeals could have reversed and ordered a new trial for errors on the trial; it could have reversed for failure of proof—but it could not direct a verdict where the proper motion was not made.

The trial court in its opinion adopted one of the three alternatives—it sustained the verdict of the jury. Although the question of causal relationship had necessarily to be governed by inferences or even conjectures upon the facts that were elicited, there is ample authoritative justification

* Discussed infra.

for the trial court's holding (*Lavender* v. *Kurn*, 327 U. S. 645; *Tiller, ex.* v. *Atlantic Coast Line R. Co.*, 318 U. S. 645; *Bailey* v. *Central Vermont Ry. Co.*, 319 U. S. 350; *Wilkerson* v. *McCarthy*, 336 U. S. 53). Oft have we been told that the question of causal relationship or proximate cause in a legal sense involves an embarrassing question with metaphysical distinctions and subtleties difficult of satisfactory application in the varied and practical affairs of life. That is the reason for juries! *

Very often the line between proximate and remote consequences is a shadowy one. Very often it is very difficult to determine whether there is such a connection between the wrong alleged and the resulting injury. There again is the necessity of a jury evaluation and not the evaluation on a cold record.

Here the learned Court of Appeals would have us believe that negligence exists in a vacuum. Negligence can only be evaluated by the result it produces, and it is the whole picture that should be taken into consideration.

The rule gives the opportunity to the district court to decide in the first instance whether or not there was sufficient evidence of causal connection to be submitted to the jury. After the verdict, the district court has the power to decide that question providing Rule 50(b) was complied with—a motion must be made within 10 days for direction of judgment notwithstanding the verdict.

Had the proper motion been made and the district court denied it, the Court of Appeals could, on its review of the case, have reversed the district court's ruling and directed a verdict for the respondent here.

But in the absence of the motion the Court of Appeals could do no more than the district court did in exercising its discretion on the alternatives provided by the rule. It could therefore, on the motion as made, set aside the verdict, but it could not direct judgment for respondent notwithstanding the verdict.

---

* *Texas* v. *Guidry*, 9 S. W. 2d 284, aff'd 280 U. S. 531.

Argument

In discussing the authorities, we believe our purpose will best be served by commenting upon some of those cases which were decided before the adoption of the Rule and then those that came after. There were many, and we have attempted to analyze only those that apparently seemed to set forth the rationale of the rule.

Prior to the adoption of Rule 50(b) there were two cases in this Court that seemed to clarify the power of both district court as well as appellate court on motions for directed verdict. *Slocum* v. *New York Life Insurance Co.* supra, and *Baltimore and Carolina Line* v. *Redman*, supra.

The *Slocum* case was tried in the U. S. Circuit Court of Pennsylvania. The defendant had moved for a directed verdict, urging that the evidence was insufficient. The trial court denied the motion and plaintiff had a verdict. The Circuit Court of Appeals concluded that the evidence was insufficient and reversed the judgment for the plaintiff and directed that judgment be entered for the defendant. The motion made by the defendant at the end of the entire case for a direction *was denied without reservation.* The Circuit Court of Appeals had failed to leave the question of a new trial or such a direction to the lower court. This Court granted certiorari and held that the direction of a verdict for the defendant by the Circuit Court of Appeals was an infraction of the Seventh Amendment in that the only power that the Circuit Court of Appeals had was to order a new trial.

In the *Redman* case, also decided before the adoption of Rule 50(b), the District Court *expressly reserved its ruling on defendant's motion* to dismiss and for a direction of the verdict. Both motions in the *Redman* case were based upon the ground that the evidence was insufficient to support a verdict for the plaintiff. Plaintiff had a verdict. Thereafter the trial court held the evidence sufficient and entered a judgment for the plaintiff on the verdict. The

Circuit Court of Appeals held the evidence insufficient and reversed the judgment with a direction for a new trial. That court felt itself bound by the holding in the *Slocum* case, apparently overlooking the substantial difference in the two cases. This Court pointed out that the Circuit Court of Appeals had the power to direct a verdict in the *Redman* case because under the reservation the verdict was taken conditionally, it being implicit in the taking of the verdict that the trial court could still rule on the sufficiency of the evidence. In discussing the *Slocum* case this Court stated that the state statute was applicable to trials in the federal courts as long as its application would not affect an infraction of the Seventh Amendment, but that there was such an infraction in that although the Circuit Court could set aside the verdict for error of law, and direct a new trial, it could not itself determine the issues of fact and direct a judgment for the defendant "if this would cut off the plaintiff's unwaived right to have the issues of fact determined by a jury". It also indicated the difference between reserving decision on a motion for a directed verdict and an outright denial of that motion, and held that in the *Redman* case, the trial court having expressly reserved its ruling on the question of insufficiency of evidence, which was a question of law, the verdict taken by the plaintiff was subject to the condition of a ruling thereafter on the question of sufficiency. That made it purely a question of law, and the trial court having committed error, the Circuit Court could correct that error and direct a verdict for the defendant. This Court then held that its holding in the *Slocum* case was not binding in view of the different circumstances and modified the judgment by substituting a direction for a judgment of dismissal on the merits in place of the direction for a new trial.

There were many other cases, but we believe that these two amply illustrate the situation that existed *prior to* the adoption of Rule 50(b).

Here was real confusion—natural and excusable. Something had to be done. Rule 50(b) was promulgated. That set forth a pattern of procedure which stated clearly to courts, litigants and counsel the orderly procedure. No longer was it necessary for courts to reserve and lawyers to consent to such reservation. The reservation became automatic. The court now may deny the motion and still act on the legal question of sufficiency of the evidence and may direct a judgment after the verdict. The rule reads:

> "Whenever a motion for a directed verdict made at the close of the evidence is denied or *if for any reason is not granted* (such a reason, we add, is a reservation), the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion." (Italics ours.)

Now the aggrieved party has another opportunity to have the court reconsider this decision, provided, however, that the aggrieved party has complied with that portion of the rule which provides that he move within ten days after the verdict.

Rule 50(b) remained more or less unchallenged until 1946. At that time the Advisory Committee in its final report dealing with recommended amendments proposed to amend Rule 50(b) by doing away with the necessity of a post-verdict motion for judgment. Not only was that recommendation not adopted, but at that time there was pending in this Court the case of *Cone* v. *West Virginia Pulp and Paper Co.* which was thereafter decided and reported in 330 U. S. 212. We believe that that case clarified the meaning and intent of the rule and indicated clearly why the Supreme Court had rejected the Advisory Committee's proposed amendment.

In that case plaintiff had sued for damages for trespass. The action was tried in the United States District Court for the District of South Carolina and resulted in a verdict for the plaintiff. The defendant during the trial had chal-

lenged the plaintiff's title and possession of the lands and timber in question and these were the crucial issues in the trial. At the end of the entire case the defendant moved for a directed verdict upon the ground that the plaintiff had failed to prove title or possession. The motion was denied and the jury returned a verdict for the plaintiff. The defendant moved for a new trial on the ground of newly-discovered evidence. That motion was denied. The defendant failed to move within ten days for a judgment notwithstanding the verdict under Rule 50(b). The Circuit Court of Appeals for the Fourth Circuit held that there was prejudicial error in the reception of evidence as to title and that without it there was insufficient evidence on the question of title as well as possession, and reversed the case. But the Circuit Court failed to send it back for a new trial and directed that judgment be entered for the defendant. The plaintiff obtained certiorari, challenging the power of the Circuit Court of Appeals to direct a judgment for the defendant.

This Court, by Mr. Justice Black, reviewed a great number of cases which had been decided since the adoption of the Rule.

On three prior occasions the Supreme Court granted certiorari to examine whether there had been sufficient compliance with Rule 50(b) (*Berry* v. *U. S.*, 312 U. S. 450; *Conway* v. *O'Brien*, 312 U. S. 492, and *Halliday* v. *U. S.*, 315 U. S. 94). In all the three cases the court did not find it necessary to pass upon the compliance with the rule for the reason stated in the *Halliday* case, supra:

> "We granted certiorari as we had in *Berry* v. *U. S.* and *Conway* v. *O'Brien*, because of the importance of the question concerning Rule 50(b). However, as in those cases, we do not reach that problem, since we are of the opinion that the evidence was sufficient to support the verdict."

In granting certiorari this time the Court, as in the instant case, limited the question to the applicability of

Rule 50(b) (329 U. S. 701). The question squarely presented was whether or not a party's failure to make a motion for judgment notwithstanding the verdict, as provided for by Rule 50(b), precludes the reviewing court from directing entry of such judgment. The court accepted the Circuit Court of Appeals' finding of prejudicial error in the admission of evidence "without approving or disapproving" and dealt only with the question of procedure as applicable to the circumstances of that case.

Mr. Justice Black made it quite clear that it was the belief of the Supreme Court that the practice which had been proposed by the Advisory Committee in its proposed amendment to Rule 50(b) and which seemed to have been followed by some of the circuit courts of appeal, that an appellate court could order final judgment in accordance with a motion for a directed verdict made at the end of the testimony, although no post-verdict motion for judgment under Rule 50(b) was made in the District Court, was not only not authorized by the rule but was furthermore not a sound practice. It was pointed out that the wording of the rule permits the trial court to reopen the judgment and *either* order a new trial *or* direct the entry of judgment as if the requested verdict had been directed. "This 'either or' language means what it seems to mean—namely that there are circumstances which might lead the trial court to believe that a new trial rather than a final termination of the trial stage of the controversy would better serve the ends of justice. In short, the rule does not *compel* a trial judge to enter a judgment notwithstanding the verdict instead of ordering a new trial; it *permits* him to exercise a discretion to choose between the two alternatives * * *. Exercise of this discretion presents to the trial judge an opportunity, after all his rulings have been made and all the evidence has been evaluated, to view the proceedings in a perspective peculiarly available to him alone".

The Court further pointed out some practical reasons for not foreclosing a litigant's right to a new trial, such as

failure of certain proof which could easily be supplied. To the suggestion that the petitioner should have presented affidavits to the Circuit Court of Appeals to support his claim for a new trial and that the court could then have remanded such a question to the District Court, Mr. Justice Black pointed out that such a circuitous move should not be approved, that the provision of the Rule is much better practice, and that submitting such a question to the Circuit Court of Appeals would by-pass the District Court, wherein the primary discretionary responsibility was put. This Court then held that the respondent having failed to submit a motion for judgment notwithstanding the verdict to the trial judge so that he might determine whether to direct or order a new trial, the appellate court was without power to direct the District Court to enter judgment contrary to the jury verdict.

Later on, in *Globe Liquor Co.* v. *San Roman* (1947), 332 U. S. 571, the Court re-emphasized the importance of having the District Court first pass upon whether there should be a final determination of a suit. In that case both sides had moved for a directed verdict and the District Court granted plaintiff's motion. The Circuit Court of Appeals thought that there was a distinction between a jury verdict and a directed verdict. Here again the litigant failed to move under Rule 50(b). Nevertheless the Circuit Court reversed and directed judgment for the defendant. Certiorari was granted to consider the apparent inconsistency between this latter action of the Circuit Court and the Supreme Court's holding in the *Cone* case. The Supreme Court held that the Rule applies equally to cases where the verdict was directed or where the jury determined a verdict. Then the court re-emphasized its holding in the *Cone* case: "*Determination of whether a new trial should be granted or judgment entered under Rule 50(b) calls for the judgment in the first instance of the judge who saw and heard the witnesses and has the feel of the case, which no appellate printed transcript can impart.*" (Italics ours.) This Court approved the judgment of the Circuit Court

of Appeals in reversing and remanding, but since the respondent failed to comply with Rule 50(b) it was held error to direct the District Court to enter judgment in respondent's favor, and therefore a new trial was ordered.

In *Fountain* v. *Filson*, 336 U. S. 681, this court explained the holding in the *Globe Liquor* and *Cone* cases as follows:

> "* * * judgment could not be given in the court of appeals in favor of a party who had lost in the trial court and who had not there moved for such relief. *One of the reasons for so holding was that otherwise the party who had won in the trial court would be deprived of any opportunity to remedy the defect which the appellate court discovered in his case. He would have had such opportunity if a proper motion had been made by his opponent in the trial court*" P. 683. (Italics ours.)

The Effect of the Defendant's Failure to Comply With the Rule.

The only motion made by the defendant after the reception of the jury's verdict was to move to set it aside because "it is contrary to the law and contrary to the evidence and contrary to the weight of the evidence and excessive" (R. 145). In effect, this is a motion for a new trial. It was not a motion n. o. v.

In *Missouri Pacific R. Co.* v. *Baldwin* (C. C. A. 8th) 1941, 117 F. (2d) 510, although the reviewing court found error in the trial court's failure to direct a verdict for the defendant, it found itself obliged to send the case back for a new trial. There, as here, the defendant failed to move under the rule. The court stated, "But as the only motion of the railroad company after the verdict was for a new trial, the judgment is reversed for the errors we have pointed out and the cause is remanded for a new trial" (P. 515).

The above obviously followed the pattern set by this Court in *Montgomery Ward* v. *Duncan*, 311 U. S. 243.

Despite the attempt in 1946 of the Advisory Committee recommending to the Supreme Court an amendment of Rule 50(b), so that an appellate court would have the power to give final judgment in accordance with the motion for a

directed verdict, although no motion n. o. v. was made under Rule 50(b), the Supreme Court refused to adopt this recommendation (Moore's Federal Practice, 2d Ed., volume 5, p. 2335).

On appeal, the appellate court can do no more than the trial court.

Montgomery Ward Co. v. *Duncan*, supra;
Binder v. *Commercial Travelers, etc.* 165 F. 2d 896, 902;
Garman v. *Metropolitan Life Ins.* (C. A. 3d) 1949, 175 F. (2d) 24.

In the *Binder* case, supra, the Circuit Court of Appeals for the 2nd Circuit in its original decision had reversed and directed a verdict for the plaintiff although no motion was made n. o. v. Defendant moved for a rehearing. Circuit Judge Clark on the petition for a rehearing agreed with the defendant's position that the power of the reviewing court was limited because of the failure to move under Rule 50(b), and granted a new trial. The court felt itself obliged to follow that procedure under the *Cone* case, and stated that it could not "interfere with the judge's discretionary power in ordering a new trial", page 902.

In the *Garman* case the Court of Appeals for the 3rd Circuit again had to deal with the failure of the defendant to move n. o. v. under the rule. The district court had directed a verdict for the defendant. The reviewing court agreed that on the merits such a verdict was justified. However, in view of the defendant's failure to comply with the rule, the circuit court reversed and remanded the cause for a new trial.

There is all the difference in the world between a motion to set aside the verdict and a motion for a direction notwithstanding the verdict. In the first instance, the trial court deals essentially with either errors of law during the trial, which could be avoided upon a retrial, or most of the time with the question of the weight of the evidence. On the other hand, in the second instance, the trial court deals

with a question of law. This time it is not a question of weight of evidence but sufficiency of evidence from which a legal basis could be found. *Marsh* v. *Illinois Cent. R.*, 175 F. 2d 498; *Adams* v. *U. S.*, 116 F. 2d 199, citing *Mt. Adams and E. P. Inclined R. Co.* v. *Lowery*, 74 F., 463, 476.

The purpose of the rule was perhaps best expressed in *Montgomery Ward* v. *Duncan*, supra, wherein it was stated that the rule "merely renders unnecessary a request for reservation of the question of law or a formal reservation; and in addition regulates the time and manner of moving for direction and of moving for judgment on the basis of the refusal to direct. It adds nothing of substance to the rights of litigants heretofore existing and available through a more cumbersome procedure".

Simply stated, the rule is that if a party moves for a directed verdict at the close of all the evidence and a verdict and judgment is rendered against him, he may, without moving for judgment notwithstanding the verdict, question the legal sufficiency of the evidence on appeal. *If his contention is sustained, the appellate court must remand for a new trial.* If, on the other hand, within ten days he has also moved for judgment notwithstanding the verdict, the appellate court may order judgment in his favor (Moore's Federal Practice, 2nd Ed., Vol. 5, p. 2333).

The Proper Procedure

Where proper procedure was followed in the trial court by compliance with the rule, the reviewing court was able to reverse and grant judgment n. o. v. (*Mass. Mut. Life Ins. Co.* v. *Smith*, 193 F. 2d 511, 513). To the same effect, *Venides* v. *United Greek etc.*, 168 F. 2d 681, 683-684.

As an example of proper procedure and compliance with the rule giving both district courts and appellate courts the power to act is the case of *Raudenbush* v. *Baltimore and Ohio Railroad*, 63 F. Supp. 329, 160 F. 2d 363. This was an action under the F. E. L. A. and also under the Safety Appliance Act. The trial court refused to submit the question under the Safety Appliance Act, but did submit the

question of negligence and causal relationship under the F. E. L. A. The jury returned a verdict in favor of the plaintiff after the defendant had moved for a direction of the verdict. In compliance with the rule, the defendant then moved for judgment n. o. v. The trial court upon reconsideration analyzed the testimony and came to the conclusion that the evidence was insufficient and set aside the verdict and directed judgment in favor of the defendant. On appeal the Circuit Court of Appeals for the Third Circuit (1947) found that the district court's decision on the question of negligence was correct, but also found that the question as to causal relationship under the Safety Appliance Act, under the proof and pleadings, was one for the jury's determination and not for the court, and that under Rule 50(b) the lower court should have granted a new trial.

In the instant case, even assuming, without conceding the correctness of the ruling of the Court of Appeals in finding insufficient evidence of causal relationship, the court could not direct a verdict but could only order a new trial. The new trial would not only give the district court an opportunity to re-evaluate the question of sufficiency of the evidence, but would permit it to submit to a jury the two other questions of negligence which were properly pleaded and proved, i.e., the question of the unsafe place, as well as the failure to exercise reasonable care in attempting to rescue Johnson after he fell into the water.

CONCLUSION

For the foregoing reasons, the decision of the Court below should be reversed.

Respectfully submitted,

JACQUIN FRANK,
Counsel for Petitioner.

JACQUIN FRANK,
HERMAN B. GERRINGER,
On the Brief.

LIBRARY
SUPREME COURT, U.S.

Office - Supreme Court, U.S.
FILED
OCT 22 1952
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1952

No. 40

MARGARET JOHNSON, as Administratrix of the goods, chattels and credits of CHARLES JOHNSON, deceased,

Petitioner,

v.

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD CO.

PETITIONER'S REPLY BRIEF

JACQUIN FRANK,
Counsel for Petitioner.

JACQUIN FRANK,
HERMAN B. GERRINGER,
on the Brief.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1952

No. 40

MARGARET JOHNSON, as Administratrix of the goods, chattels and credits of CHARLES JOHNSON, deceased,

Petitioner,

v.

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD CO.

PETITIONER'S REPLY BRIEF

In essence, respondent contends here (1) that its motion to set aside the verdict was in effect a motion for judgment n.o.v. as well as a motion for a new trial, and (2) that no post-verdict motion for judgment was necessary in view of the trial court's reservation of decision on respondent's motion for a directed verdict.

Answering Point I of Respondent's Brief

Respondent argues that its motion made after the verdict was "intended" to be a motion for judgment or for a new trial and since neither the District Court nor the Court of Appeals nor the petitioner objected to the adequacy of the motion, presumably neither should this Court.

As to the latter point it need only be pointed out that there is not the slightest indication in the record that the District Court interpreted respondent's motion otherwise than it purported to be—a motion to set aside the verdict

(R. 159). Since the motion was denied, we are given no further light on the question of whether that Court considered respondent's motion "adequate" or equivalent to a motion for judgment.

As to the feeling of the Court of Appeals on the adequacy of the motion, the decision of that Court was based either on an erroneous interpretation of the motion as made as a proper motion for judgment pursuant to Rule 50(b) or an erroneous exercise of its power to direct a verdict contrary to the jury's verdict despite the absence of a proper motion for judgment pursuant to the Rule. In either case that is the very point for decision here. It rather begs the question to contend that the lower court cannot be mistaken because it is "presumably familiar with the earlier decisions of this Court."

Finally, as to petitioner's failure to object to the "adequacy" of the motion, it need only be pointed out that the question did not arise until the Court of Appeals' reversal and direction of judgment for the respondent. Since the error occurred at this point it could hardly be pointed out earlier.

On the question of the equivalence of respondent's motion to set aside the verdict to a motion for judgment under Rule 50(b), respondent suggests the interesting idea that that part of its motion which sought to set aside the verdict as contrary to the law and the evidence was equivalent of a motion for judgment. Presumably, the balance of the motion was for a new trial.

The trouble with this argument is that it ignores the essential nature of a motion to set aside a verdict upon errors of law or evidence. On such a motion the trial court considers errors of law committed during the trial. But unless the motion includes a prayer for judgment despite the verdict, the Court is not being asked to consider the possible insufficiency in law of the evidence which would be the only ground for setting aside the verdict and granting judgment notwithstanding the verdict. In the absence of

such motion for judgment, the relief sought and the only relief that can be granted, if there has been error, is the setting aside of the verdict and the ordering of a new trial in which the error can be corrected.

In other words, the trouble with respondent's motion as made, was that it lumps all errors of law, both the fatal and the correctible errors, into one class and thereby prevents the trial court from exercising its judicial discretion in the granting of the applicable relief for each classification of error.

The Rule itself recognizes the distinction between a motion to set aside a verdict and judgment and a motion for judgment. It provides explicitly that within ten days after reception of the verdict, "a party * * * may move to have the verdict and any judgment entered thereon set aside *and* to have judgment entered in accordance with his motion for a directed verdict." (Italics ours.)

Giving this language its plainly intended meaning, it is obvious that a motion to set aside a verdict is not "equivalent" to a motion for judgment n.o.v.

Indeed the cases urged by respondent on this point, *Binder* v. *Commercial Travelers Mut. Acc. Ass'n*, 165 F. 2d 896, and *Gillis* v. *Reicks*, 7 F. R. D. 205, support this plain distinction between the two motions. In the *Binder* case, it appears that there had been no motion for judgment n.o.v. and the motion to set aside the verdict was deemed to constitute a motion for a new trial even though the motion as made did not specifically mention any request for a new trial (although the District Court's order had provided in the alternative for such new trial). In the *Gillis* case the motion was properly made both to set aside the verdict *and* for judgment n.o.v. But since the ground stated for the motion was appropriate only to a new trial, the relief granted was for such new trial.

Answering Point II of Respondent's Brief

Here, respondent argues that the requirement of the Rule for a post-verdict motion for judgment does not apply to the situation where a prior motion made for direction of a verdict has not been decided by the Trial Court, but applies only where such motion has been denied.

To support this proposition respondent ignores the plain language of the Rule itself. The pertinent wording of the first sentence of the Rule is: "Whenever a motion for a directed verdict * * * is denied *or for any reason is not granted,* the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion." (Italics ours.) There follows then the provision for motion to set aside the verdict and for judgment in accordance with the prior motion for directed verdict.

Unless the underlined words above quoted are to be taken as meaningless, the intendment of the Rule is that it applies to a situation where the trial court has reserved decision on the motion for directed verdict as well as to the denial of such motion.

The obvious purpose of the Rule was to give the trial court the opportunity to pass on the legal questions raised by the motion for directed verdict after the jury had passed on the fact questions in the case. This purpose was accomplished by an automatic reservation of decision on the motion made at the close of the evidence. But the moving party is required to elect, after the verdict has come in, whether to move merely to set aside the verdict and for a new trial, or to move also for judgment in accordance with his prior motion for directed verdict, or for both reliefs. The situation has changed qualitatively with the unfavorable verdict as to the moving party and by the nature of his post-verdict motion he gives the trial court (and later on the appellate court) the opportunity to choose the relief, if any, to which he is entitled.

Whether the prior motion for directed verdict was denied or decision thereon reserved (either specifically or

by operation of the Rule) this second opportunity is granted him but, as pointed out in *Montgomery Ward & Co.* v. *Duncan*, 311 U. S. 243, 254, the Rule "* * * regulates the time and manner of moving for direction and of moving for judgment on the basis of the refusal to direct."

As has been pointed out in our main brief and conceded by respondent on page 18 of its brief, the Advisory Committee on the Rules of Civil Procedure in its 1946 Report of Proposed Amendments to the Rules sought an amendment which would do away with the post verdict motion for judgment. In effect respondent's position here is a reiteration of the arguments advanced by the committee.

The proposal was as follows:

> "The making of a motion for judgment in conformity with the motion for a directed verdict shall not be necessary for the purpose of raising on review the question whether the verdict should have been directed or whether judgment in conformity with the motion for a directed verdict should be entered" (Moore's Fed. Pr.—2nd Ed. Vol. 5, pp. 2304-2305).

This Court saw fit to reject that proposal and in the *Cone* case in 1947 made quite clear its position that an appellate court had no authority to order final judgment in accordance with a motion for directed verdict made at the end of the testimony *unless* a post verdict motion for judgment was made in the District Court. It was for the District Court to choose between the two alternatives of entering judgment notwithstanding the verdict or ordering a new trial. And this choice must be based on the motions made after the verdict.

The cases cited by respondent are not very helpful on the point. In every instance, save one, the cases were decided *prior* to the decision in the *Cone* case. Indeed it was to settle the different views in the various circuits that the *Cone* case was decided as it was.

The exception above noted is the *Mullen* case, quoted from at considerable length on pages 9 to 11 of respondent's brief. This is a 1950 district court decision based on *Kline*

v. *Yokom*, 117 F. 2d 370 (C. C. A. 7, 1941) which was decided prior to the *Cone* case. The precedent relied on was overruled by the *Cone* case.

No one is prophet enough to be able to evaluate any and every situation that may arise in the trial of a case where the trial court may find itself impelled to re-evaluate errors made in the reception of evidence—errors that may go to the general and prejudicial conduct in the trial of a case, or insufficiency of evidence.

The winning party should not be placed into a position where he cannot assess the advisability of moving for a new trial in the event of the trial court's disagreement with the jury verdict. If warned in time (by a motion under the rule) the winning party may then ask the trial court to make an alternative order as in the *Montgomery Ward* case. That opportunity is denied the winning party when for the first time the reviewing court orders a judgment against him which forecloses any further rights. The rule has provided for orderly procedure. In the long run compliance with the provisions of the rule will lead to less confusion than the emasculation of or whittling down by strained interpretation, the fair intendment of the rule.

The extent of the power of the courts of appeal to order either a direction of judgment or a new trial under the circumstances set forth in Rule 50(b) has been clearly set forth in the *Cone* case and *Globe Liquor Co.* case. The rule is clearly applicable to the case at bar. The lower court by ordering direction of verdict for respondent despite its failure to move for judgment notwithstanding the verdict was in error and the judgment should be reversed.

Respectfully submitted,

JACQUIN FRANK,
Counsel for Petitioner.

JACQUIN FRANK,
HERMAN B. GERRINGER,
on the Brief.

LIBRARY
SUPREME COURT U.S.

Office - Supreme Court, U. S.
FILED
MAY 29 1952
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1951

No. ~~429~~ 40

MARGARET JOHNSON, as Administratrix of the goods, chattels and credits of Charles Johnson, deceased,

Petitioner,

—against—

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY,

Respondent.

BRIEF ON BEHALF OF THE RESPONDENT, THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI.

EDWARD R. BRUMLEY,
Attorney for Respondent,
Room 3841, Grand Central Terminal,
New York City.

ROBERT M. PEET,
Of Counsel.

THE COURT PRESS, N. Y. C.

INDEX.

	PAGE
I—Opinions of the Courts Below	1
II—Jurisdiction	2
III—Questions Presented	2
IV—The Facts	2
(a) The Background	2
(b) The Accident	5
(c) Custom and Practice	8
V—The Court of Appeals for the Second Circuit correctly held that petitioner failed to prove that respondent's negligence caused Johnson's death	10
VI—The Court of Appeals for the Second Circuit was correct in ordering that a verdict for respondent should have been directed, rather than ordering a new trial	17
Conclusion	19

TABLE OF CASES CITED:

Atchison, T. & S. F. Ry. Co. v. *Saxon*, 284 U. S. 458 (1932)	15
Atchison, T. & S. F. Ry. Co. v. *Toops*, 281 U. S. 351 (1930)	15
Baltimore & Carolina Line, Inc. v. *Redman*, 295 U. S. 654 (1935)	18
Beamer v. *Virginian R. Co.*, 321 U. S. 763	16
Boston & M. R. Co. v. *Coppellotti*, 167 F. 2d 201 (1st Cir. 1948)	15
Chisholm v. *Reading Co.*, 329 U. S. 807	16
Cowdrick v. *Penn. R. Co.*, 323 U. S. 799	16

PAGE

Fantini v. *Reading Co.*, 325 U. S. 856 16
Fratta v. *Grace Line, Inc.*, 139 F. 2d 743 (1943) 18

Glover v. *Compagnie Generale Transatlantique*, 308 U. S. 550 16

Healy v. *Pennsylvania R. Co.*, 184 F. 2d 209 (3rd Cir. 1950), cert. den. 340 U. S. 935, reh. den. 71 Sup. Ct. 620 15

Lasagna v. *McCarthy*, 332 U. S. 829 16
Limbershaft Sales Corp. v. *A. G. Spalding and Bros.*, 111 F. 2d 675 (1940) 18

Miller v. *Browning S. S. Co.*, 334 U. S. 834 16
Moore v. *Chesapeake & Ohio R. Co.*, 340 U. S. 573 (1951) 14

Negro v. *Boston & Me. R.*, 324 U. S. 862 16
Northwestern Pac. R. Co. v. *Bobo*, 290 U. S. 499 (1934) 15
N. Y. Central R. Co. v. *Ambrose*, 280 U. S. 486 (1930) 14

Pennsylvania R. Co. v. *Chamberlain*, 288 U. S. 333 (1933) 14

Scarborough v. *Penn. R. Co.*, 326 U. S. 755 16

Trust Co. of Chicago v. *Erie R. Co.*, 165 F. 2d 806 (7th Cir. 1948), cert. den. 334 U. S. 845 ..... 15, 16

Waller v. *Northern P. T. Co.*, 329 U. S. 742 16
West v. *Eastern Transp. Co.*, 179 F. 2d 478 (4th Cir. 1950), cert. den. 340 U. S. 810 ..... 15, 16
Wolfe v. *Henwood*, 332 U. S. 773 16

OTHER AUTHORITIES CITED:

Federal Employers' Liability Act 14, 16

Federal Rules of Civil Procedure, Rule 50(b) 17, 18

28 U. S. C. § 1254 (1) 2

46 U. S. C. § 688 (Jones Act) 2, 16

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1951.

No. 729.

MARGARET JOHNSON, as Administratrix of the goods, chattels and credits of Charles Johnson, deceased,

Petitioner,

—against—

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY,

Respondent.

BRIEF ON BEHALF OF THE RESPONDENT, THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI.

I.

Opinions of the Courts Below.

The opinion of Judge Abruzzo of the United States District Court for the Eastern District of New York is not officially reported but appears in the record on appeal at pages 159 to 164.

The opinion of the United States Court of Appeals for the Second Circuit written by Judge Swan is officially reported in 194 F. 2d 194 and appears at the end of the record on appeal at pages 171 to 175.

II.

Jurisdiction.

Petitioner alleges jurisdiction of this Court under 28 U. S. C. § 1254 (1). The judgment of the Court of Appeals sought to be reviewed was rendered on February 4, 1952. The action was brought under the Jones Act, 46 U. S. C. § 688.

III.

Questions Presented.

Did the Court of Appeals for the Second Circuit correctly decide that petitioner failed to prove that respondent's negligence caused the death of petitioner's intestate?

Did the Court of Appeals correctly order the direction of a verdict for respondent instead of ordering a new trial?

IV.

The Facts.

(a)

The Background.

On the afternoon of his death on April 22, 1946, Charles Johnson reported for work at Pier 39, Manhattan in the East River about 4:30 p. m. as a floatman on respondent's tug "Transfer No. 10" (R. 10).

He had been a member of the crew of "Transfer No. 10" for several months (R. 11, 47). He had worked regularly under Captain O'Brien, the master of the tug, during this period and on previous occasions (R. 11, 47). He had worked on respondent's tugs for about nine years (R. 47, 94). He was an experienced man, well qualified in his job, and a good swimmer (R. 46, 65). He was 41 years old (R. 93).

Mrs. Margaret Johnson testified initially that her husband had never been in a hospital or had any serious illness (R. 94, 98). She further claimed that he had never been away from his job with respondent on account of illness, and had never been away as much as a month for any reason (R. 98). She later admitted, after being shown Exhibit C, that he had been away a few weeks in May of 1943 on account of a hernia; for which no operation had been performed, but denied any further absence in 1943 or sickness in 1944 (R. 98-99, 120-121).

She denied having written Exhibit C, a letter dated May 31, 1943, signed with her name, stating that her husband had not been feeling well for several weeks owing to stomach trouble and had been advised by a doctor to rest for several weeks (R. 119-120). She claimed that the letter was written by her sister, Mrs. Hops, to the knowledge of herself and her husband and at the latter's direction, but that its contents were untrue and incorrect (R. 119-120).

The employment records kept in the regular course of respondent's business, which were produced in court, showed that in addition to other occasions Johnson was away from his work on account of sickness May 17 to August 14 and December 17 through 31 in 1943 and October 8 to December 8 in 1944 (R. 121-128).

Captain O'Brien was in sole charge of the tug and its crew (R. 50-51). He had held a master's license 19

years and had worked on tugs for respondent 26 years. (R. 65). His deck force consisted of a first and second deckhand and a floatman (R. 10). Below decks were an engineer, a fireman and an oiler (R. 10).

"Transfer No. 10" first took a loaded carfloat from Pier 39 to Bridge 5 of the floatbridges at respondent's Oak Point yards in the Bronx (R. 11-12). Johnson carried out his usual duties for this movement (R. 12, 48). The tug then moved about 70 feet to a place called "The Hole" to take on water and await the next move (R. 12-13, 48-49). Orders then were given for the tug to remove two empty carfloats from Bridges 11 and 12 and to tie them up about 500 feet away outside Pier 3 at the Church E. Gates Dock (R. 13, 49-50, 60).

"Carfloat 53" was in Bridge 11 and "Carfloat 58" in Bridge 12, each lying bow in and stern out (R. 14-17). They were 340 feet long and 40 feet wide, with about five feet of freeboard (R. 42, 71, 24). Tug "Transfer No. 10" had a glass-enclosed pilot house the floor of which was about ten feet above the deck of the tug and carfloats (R. 52).

The floatbridges, carfloats, and tug are shown in Exhibits 1, 2, A, and B. The upper half of the tug can be seen in Exhibits 1 and 2 (R. 56-57). "Carfloat 53" in Bridge 11 is pictured in Exhibit 1, while "Carfloat 58" just outside Bridge 12 is shown in Exhibit 2 (R. 14-15). Between Bridges 11 and 12 was a short rack, so labeled in ink in Exhibit 2, which was about 50 to 60 feet long and which is shown in Exhibits 1, 2, and B (R. 19, 28, 58). On the outer sides of Bridges 11 and 12 were long racks, which extended out much farther than the short rack (R. 59). They are partly visible in Exhibits 1, 2, and B, the one in Bridge 12 being so labeled in ink in Exhibit 2 (R. 19). A stair, visible in Exhibit A, led down into the water from each bridge, and a person in the water could at any

stage of the tide either mount the stair or walk ashore under the bridge structure (R. 65-66).

Carfloats were held secure in floatbridges by rack lines, which belonged to the racks not the carfloats (R. 22-23, 67). Near the bow of each carfloat a short rack line, marked "R" in ink in Exhibit 2 and unmarked in Exhibit 1, made the float fast (R. 18-19). Toward the stern of each carfloat a long rack line made it fast (R. 22).

Usually a bridgeman, if any were ordered to a bridge, would stand on the long racks and from there would release the long rack lines by throwing them off and hauling them up, and a floatman on the carfloats would release the short rack lines (R. 16-17, 20-23, 67). In the absence of a bridgeman, the floatman would release the long rack lines (R. 68). A bridgeman would not be supposed to go on carfloats to release the short rack lines, since this was not part of his duty (R. 92). Normally, after releasing the long rack lines, a bridgeman would go to his next assignment in the yard (R. 92). After the floatman had released the last line he would customarily indicate that fact by shouting "all gone" to the captain in the pilot house to let him know the floats were ready to be moved (R. 68). The captain then would sound a slip whistle and start to pull the floats out (R. 46, 70). The floatman would stay where he was at the bow of the carfloat preparatory to securing the bows of the carfloats together by cross-lines after they had been pulled clear of the short rack and had come together (R. 26, 70).

(b)

The Accident.

When "Transfer No. 10" went to take "Carfloats 53" and "58" out of Bridges 11 and 12, it was clear and still light and the tide was ebbing (R. 13, 26, 58, 60). The captain was in the pilot house steering the tug (R. 17).

The bow of the tug was placed against the port stern quarter of "Carfloat 53" and secured there by Gaglio, the first deckhand or mate, who left the tug and went onto the float with the bow line (R. 17). The position of the tug at this point is shown in Exhibit 1 (R. 56). Santalesa, the second deckhand (who died before the trial), remained at the bow of the tug to tend the bow line (R. 25, 31, 46). Gaglio went to the stern of "Carfloat 53" preparatory to securing the sterns of the two floats with a line as soon as the tug could push them together (R. 17-18, 25, 56). Johnson followed Gaglio off the tug and proceeded toward the bow of "Carfloat 53" in order to release the short rack lines (R. 18).

Johnson was last seen alive by any one as he walked along "Carfloat 53" after getting off the tug (R. 20-21, 25, 52). He was to have released the short rack line in Bridge 11, gone ashore to get to Bridge 12, released the short rack line in Bridge 12, shouted "all gone", and then stayed there to make fast the bow cross-lines (R. 20-23, 26, 68, 70, 92).

After Gaglio had fastened the sterns of the carfloats together, he returned to a place on "Carfloat 53" next to the bow of the tug and carried the bow line in his hand in order to shift it as the tug maneuvered to get into position to pull the floats out (R. 27-28, 60). On account of the short rack, neither he nor Captain O'Brien could see the port bow corner of "Carfloat 58", where Johnson was supposed to release the short rack line of Bridge 12 (R. 28, 68). The view they had is shown in Exhibit B (R. 69). Neither Gaglio nor O'Brien saw any bridgemen at any time (R. 42, 68). Both heard some one up forward shout "all gone", but neither could positively identify the voice as that of Johnson (R. 29, 55-56, 59). Captain O'Brien normally could not recognize a voice 300 feet away, the distance Johnson was if on the bow of "Carfloat 58" (R. 64-65, 71). When he heard

the "all gone", he could see the bow line and all the rack lines except the short rack line of Bridge 12, and he noticed that all the rack lines he could see were released (R. 28, 70). He could see Gaglio but not Johnson (R. 26, 68).

After O'Brien determined from the "all gone" signal that the carfloats were ready to be pulled out, he sounded a slip whistle as notice to every one that the floats were about to move, and then commenced gradually to move them (R. 46, 57, 70-71). They came out without any trouble, as the tug backed them out on a line (R. 33-34, 70). The tug shown in Exhibit 2 is pulling the floats out but its bow is headed out instead of in as "Transfer No. 10's" was (R. 57). O'Brien later learned that the short rack line of Bridge 12 had in fact been unloosened before the tug started back (R. 70). O'Brien's procedure on this occasion was the same as it always had been (R. 91-92).

O'Brien was busy maneuvering his tow and watching for river traffic as he pulled the floats out (R. 68). He first noticed that Johnson was not on "Carfloat 58" when he was in the river clear of the long racks with his tug moving ahead (R. 59-61). He asked Gaglio where Johnson was, but Gaglio did not know (R. 60). He then told Gaglio to fasten the bow cross-lines and proceeded to take the floats to Pier 3 (R. 60).

To have taken the floats back into the bridges would have involved turning them around, putting three lines out, and maneuvering them back in against the ebb tide (R. 71-73). O'Brien estimated that it was quicker to go forward as planned, leave the carfloats at Pier 3, and return light than to place them back in the bridges (R. 71-73). What he did took about 25 minutes (R. 40, 61).

At no time while the carfloats were being moved was anything unusual heard or seen, any commotion noted,

or any splash or call of any kind heard (R. 46, 71). The engine crew were at all times below deck (R. 72).

Coming into "The Hole" after leaving the floats at Pier 3, O'Brien sounded three short whistles as a signal for Johnson to rejoin the tug (R. 41, 62). When Johnson did not appear, O'Brien sent Gaglio ashore to look for him (R. 41, 62). Gaglio looked in the bridgemaster's office, the locker room, and the rope shanty (R. 41, 43, 62). Gaglio reported back to O'Brien that he could not find Johnson and was then ordered to look around the floatbridges (R. 44, 62). Gaglio finally discovered something floating in Bridge 12 and reported this to O'Brien (R. 44, 62). O'Brien directed Gaglio to get a boat hook and a heaving line, and then they went together to Bridge 12 (R. 45, 63). They lowered the bridge apron and hauled from the water what turned out to be Johnson, who was floating about three feet from the apron (R. 45, 63). It was about dusk (R. 43, 63).

Attempts to revive Johnson by artificial respiration produced no response or results (R. 45, 71). Some froth or bubbles appeared on his lips but no water was gotten from him (R. 46, 71-72). Both O'Brien and Gaglio looked Johnson over closely but saw no cuts, bruises, or other marks on him (R. 46, 63). At the funeral parlor, Mrs. Johnson and her daughter Audrey claimed to have noticed scrape marks on his forehead (R. 96-97, 101).

(c)

Custom and Practice.

Captain Holmes, called as an expert witness by plaintiff, claimed that the common custom and practice in New York Harbor for a tug captain after receiving the "all gone" signal (which meant his carfloats were ready to be moved) and before moving his carfloats was to see the

man who released the last line, to recognize his voice if he could not be seen, or, failing these two, to send some one to see the man for him (R. 79-81, 90-91). If cars were on the carfloats, the captain might have to send some one about 300 feet all the way to the bow of a carfloat to see who called "all gone" (R. 90-91).

Captain Holmes, now retired, had been a tug captain for the Pennsylvania Railroad from 1914 to 1944 moving carfloats in New York Harbor (R. 75). His experience with other railroads was extraordinarily limited. He had been once to the New York, New Haven and Hartford Railroad's floatbridges at Oak Point in 1934 (R. 87). He had been several times to the floatbridges of the Erie Railroad and the Central Railroad of New Jersey in Jersey City, the last time being in 1940 (R. 88). He was principally familiar with the floatbridges at Bay Ridge and Greenville, which railroads other than the Pennsylvania Railroad do not use (R. 88). The other floatbridges which he had been to were pontoon bridges or single-float bridges, not like those at Oak Point (R. 87-88).

He admitted that when he was at floatbridges he was not interested in the way things were being operated and did not wait around to see them (R. 89). In his entire career he had only several times seen a captain send a man to locate the position of his floatman before pulling his floats out (R. 89). One of these occasions was at the floatbridges of the Central Railroad of New Jersey some time between 1924 and 1940 (R. 90).

Captain DeMars, testifying as an expert witness for defendant, stated that the common custom and practice in New York Harbor was to operate as Captain O'Brien did, not as Captain Holmes did, and specifically denied the existence of any such practice on the Pennsylvania Railroad as Captain Holmes described (R. 106-108). Captain DeMars had been a tug captain handling carfloats

for the Pennsylvania Railroad for ten years and had had wide experience in towing throughout New York Harbor for many years (R. 105-106, 111). He pointed out that customarily "all gone" means that the last line is off, that no signal is given until the last line is off, and that the floatman not the bridgeman normally shouts "all gone" (R. 111-114).

V.

The Court of Appeals for the Second Circuit correctly held that petitioner failed to prove that respondent's negligence caused Johnson's death.

The Court of Appeals unanimously determined that there was a complete absence of probative facts to support the conclusion that respondent's negligence caused Johnson's death (R. 175). A study of the facts amply confirms this determination.

The record is bare of any evidence to show what happened to Johnson from the time he was last seen heading toward the bow of "Carfloat [illegible]" until he was fished out of the water over half an hour later at Bridge 12. There is no proof to show when, how, or why Johnson ended up in the water. To demonstrate that respondent's failure to follow the custom and practice described by Captain Holmes was the proximate cause of Johnson's death, one must build up by a series of inferences unsupported by any facts a possible sequence of events that might conceivably have happened. In so doing, one must discard other more probable explanations and rely entirely on one's imagination.

The fact that no call, splash or other unusual thing was heard or seen by those present makes it unreasonable

to infer that Johnson got into the water until after the carfloats had been removed from Bridges 11 and 12. As Captain DeMars testified, there was nothing surprising about a floatman staying ashore after releasing the last line when the work could be done without him and the tug was engaged in the vicinity in slip service (R. 109).

The fact that Johnson was a good swimmer and could easily have gotten ashore safely by wading out or walking up the floatbridge stairs makes it probable that he fell into the water because of a heart attack, a brain hemorrhage, or other physical seizure. Examination of his body when it was first taken out of the water revealed no superficial physical cause for a fall or for his failure to rescue himself. Since artificial respiration drew no water from his lungs, he probably had ceased breathing before he entered the water. He had been seriously ill in 1943 and 1944.

The fact that the "all gone" signal was given makes it logical to assume that Johnson was ready for the carfloats to be moved and was in a safe position for the move. He was an experienced, well qualified floatman. He had worked with Captain O'Brien for the last three months and on prior occasions. He knew that customarily the floats would be moved after the "all gone" signal. He knew that O'Brien and the man who released the last line could not see one another. It was the duty of no one but himself to release the last line. If he did his job as a person in his position should have, he clearly would not have called out "all gone" if he were unready for the move and would have shouted out if for any reason he became unready after giving the signal.

Although bridgemen, if ordered to a bridge, usually release the long rack lines, none was seen on this occasion, and the floatman will do so in their absence (R. 16-17, 22, 42, 67-68). If Johnson not the bridgemen released the long

rack lines, he was not observed to do this by Captain O'Brien or Gaglio because they were busy getting the sterns of the carfloats pushed together and made fast together and shifting the tug and its headlines (R. 17-18, 25-28, 56). Even if it be assumed that bridgemen released the long rack lines on this occasion, they would have left the vicinity for their next assignment in the yard well before the carfloats were moved (R. 92).

It is clear that it was no part of the bridgemen's duty to go upon the carfloats or to release the short rack lines, which had to be released from the carfloats (R. 20, 92). Indeed, it is not disputed that Johnson released the short rack lines, which it was his duty to do. At the time the "all gone" signal was heard, Captain O'Brien could see all the rack lines except the short rack line of Bridge 12, and he noticed that the ones he could see were all released (R. 70). Only one "all gone" signal was given. Consequently, the "all gone" signal could have pertained only to the short rack line of Bridge 12, which was in fact released (R. 70). Since it was Johnson's duty to give the "all gone" signal upon releasing the short rack line of Bridge 12, one can only conclude from the available evidence that he in fact did give the signal. No one else was concerned with giving the signal or in a position to do so; no one else had any right or duty to do so.

Petitioner tries to becloud this conclusion by suggesting a variety of remote possibilities. She argues that O'Brien and Gaglio would have recognized Johnson's voice if he called "all gone". Admittedly they were both over 300 feet away from Johnson, and were not concerned with identifying the voice they heard. Captain O'Brien stated positively that he could not recognize a person's voice at that distance (R. 65, 71). Even Captain Holmes agreed that this was so (R. 81). The fact that O'Brien could not recognize a voice at 300 feet, that it was his custom to start to move after hearing "all gone" (R. 55), and that

his method of work on this occasion was the same as it had been for 19 years (R. 91-92), refutes the statement in the trial court's opinion that "there was no proof offered that Captain O'Brien in previous movements pulled out of a slip without recognizing the voice of his own crew" (R. 162).

Petitioner points to Gaglio's testimony that a bridgeman hollers "all gone" when he releases a line (R. 45), and argues that a bridgeman did so in this case. Gaglio corrected this statement, however, by indicating that a bridgeman if he called would holler "all gone port" or "all gone starboard" (R. 45-46). It is clear from both the expression itself as well as from the testimony of Captains O'Brien, Holmes and DeMars that "all gone" means just what it appears to mean, namely, that all the lines have been released and the carfloat is ready to be moved (R. 68, 80, 114). A bridgeman is not in a position to see if all the lines are released and so would never call "all gone". In any event, since all lines but Johnson's had been released before the "all gone" was called, it could refer only to the release of his line when it was called and it could mean only that his line and all others were released. Petitioner says that Captain O'Brien declared that a bridgeman may possibly holler "all gone". Of course, almost anything is possible, but Captain O'Brien pointed out that the bridgemen move on to their next assignment as soon as they release their lines and they are not supposed to go onto a carfloat (R. 92), while Captain DeMars said that the floatman gives the "all gone" signal and the bridgeman does not give a signal at all (R. 113). No reason suggests itself for a bridgeman to call "all gone" when he cannot see if all the lines are released and it is not his duty to do so.

The fact that the short rack line of Bridge 12 was released not broken, considered with the lack of any evidence of any defect in "Carfloat 58" and its equipment

or of any disturbance thereof or mark thereon and considered with the positive evidence that the floats were pulled out gradually without any trouble, further negates the theory that respondent's failure to adhere to the custom and practice described by Captain Holmes could have had anything to do with Johnson's death. Nor is there the least basis for concluding that the observance of this practice could have prevented the misfortune which overtook him. Whatever was the true cause of Johnson's death, petitioner failed entirely to prove it, and on that issue petitioner had the burden of proof.

It has long been held, even in actions under the Federal Employers' Liability Act, that the rule against speculative verdicts prevents a jury from selecting one of several possible causes of an accident as a basis for fastening liability on a defendant.

Pennsylvania R. Co. v. *Chamberlain,* 288 U. S. 333 (1933);

N. Y. Central R. Co. v. *Ambrose,* 280 U. S. 486 (1930).

The rule against resting verdicts on surmise and conjecture was recently reaffirmed in *Moore* v. *Chesapeake & Ohio R. Co.,* 340 U. S. 573 (1951), where this Court in a death action under the Federal Employers' Liability Act pointed out that even if the jury disbelieved the testimony of the only eyewitness as to how decedent fell from the engine, this merely left the jury with no evidence of how he fell, and under such circumstances it would be purely speculative for it to infer that he fell because of defendant's negligent operation of the engine.

In numerous railroad cases involving employees who fell into the water or under trains without eyewitnesses to establish the cause of their deaths, the complaint

has been dismissed or a defendant's verdict directed for failure to establish that defendant's negligence was in whole or in part the proximate cause of the death.

Northwestern Pac. R. Co. v. *Bobo*, 290 U. S. 499 (1934);
Atchison, T. & S. F. Ry. Co. v. *Saxon*, 284 U. S. 458 (1932);
Atchison, T. & S. F. Ry. Co. v. *Toops*, 281 U. S. 351 (1930).

Recent decisions on similar facts hold likewise:

Healy v. *Pennsylvania R. Co.*, 184 F. 2d 209 (3rd Cir. 1950), cert. den. 340 U. S. 935, reh. den. 71 Sup. Ct. 620;
West v. *Eastern Transp. Co.*, 179 F. 2d 478 (4th Cir. 1950), cert. den. 340 U. S. 810;
Boston & M. R. Co. v. *Coppellotti*, 167 F. 2d 201 (1st Cir. 1948);
Trust Co. of Chicago v. *Erie R. Co.*, 165 F. 2d 806 (7th Cir. 1948), cert. den. 334 U. S. 845.

The rule against speculative verdicts was clearly explained in the last-named case, where the court said (p. 809):

> "One can speculate on how the accident happened, but where is the evidence as to how it did happen? Where is the evidence from which a reasonable inference could be drawn as to how it happened? Many reasonable hypotheses as to how the accident happened may be conjured up, but it is not reasonable hypotheses we are interested in, but evidence from which reasonable inferences may be drawn. . . .
> "A jury may not speculate and formulate a plausible theory as to where the accident happened and how it happened, and then speculate on what it was that the defendant did that was negligent and caused the accident."

The present case presents no general principle, no important federal question, and no conflict between courts for review. Only the application of well settled rules to the particular facts is involved. It is not within the proper business of this Court to review cases important to the parties but not to the operation of a federal system.

The mere fact that this action was brought under the Jones Act gives it no special standing that calls for a review. This Court has frequently denied certiorari in cases under the Federal Employers' Liability Act where the court has dismissed a plaintiff's case and taken it from a jury. Note, for example, the following:—

Beamer v. *Virginian R. Co.*, 321 U. S. 763;
Cowdrick v. *Penn. R. Co.*, 323 U. S. 799;
Negro v. *Boston & Me. R.*, 324 U. S. 862;
Fantini v. *Reading Co.*, 325 U. S. 856;
Scarborough v. *Penn. R. Co.*, 326 U. S. 755;
Chisholm v. *Reading Co.*, 329 U. S. 807;
Waller v. *Northern P. T. Co.*, 329 U. S. 742;
Wolfe v. *Henwood*, 332 U. S. 773;
Lasagna v. *McCarthy*, 332 U. S. 829;
Trust Co. of Chicago v. *Erie R. Co.*, 334 U. S. 845.

Many like cases could be cited under the Jones Act, such as *Glover* v. *Compagnie Generale Transatlantique*, 308 U. S. 550; *Miller* v. *Browning S. S. Co.*, 334 U. S. 834; and *West* v. *Eastern Transp. Co.*, 340 U. S. 810.

The cases cited by petitioner are merely cases in which on their particular facts it was held that a jury question was presented. On the unique facts of the case at bar, no such question can be found on the issue of causal connection.

MICRO
TRADE

CARD
MARK ®

2,054

MATTHEW BENDER & COMPANY
MB

53

VI.

The Court of Appeals for the Second Circuit was correct in ordering that a verdict for respondent should have been directed, rather than ordering a new trial.

Petitioner argues that the Court of Appeals had power only to order a new trial, not to order a directed verdict for respondent. Petitioner's argument assumes that respondent failed within ten days after the verdict to move under Rule 50(b) to set aside the verdict and any judgment entered thereon and to have judgment entered in accordance with its earlier motion for a directed verdict.

Rule 50(b) provides as follows:

> "Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Within 10 days after the reception of a verdict, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict; or if a verdict was not returned such party, within 10 days after the jury has been discharged, may move for judgment in accordance with his motion for a directed verdict. A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative. If a verdict was returned the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed. If no verdict was

returned the court may direct the entry of judgment as if the requested verdict had been directed or may order a new trial."

Right after the verdict was brought in, respondent made such a motion as was required by Rule 50(b), when it moved to set aside the verdict as "contrary to the law and contrary to the evidence and contrary to the weight of the evidence and excessive" (R. 145). Decision on this motion was reserved.

While the language of this motion was not taken literally from Rule 50(b), its purpose was clearly to have the trial court set the verdict aside and either direct a verdict for respondent because the verdict brought in was as a matter of law unsupportable and without sufficient evidence to support it or to grant a new trial because the verdict was against the weight of the evidence and excessive.

Even were petitioner's contention in this respect accepted, petitioner overlooks the further fact that the trial court reserved decision both on respondent's motion to dismiss at the close of petitioner's case and on its motion for a directed verdict at the close of all the evidence (R. 102, 105, 133, 134).

Ever since *Baltimore & Carolina Line, Inc.* v. *Redman*, 295 U. S. 654 (1935), it has been established that the reviewing court may order a directed verdict instead of a new trial where decision on the motion for a directed verdict was reserved, even though no motion was made after the verdict was brought in. The Court of Appeals for the Second Circuit has since then followed that practice and even praised it.

Limbershaft Sales Corp. v. *A. G. Spalding and Bros.*, 111 F. 2d 675 (1940).

See *Fratta* v. *Grace Line, Inc.*, 139 F. 2d 743, 744 (1943).

Nothing in the cases cited by petitioner suggests a contrary rule. They deal only with the situation where no decision was reserved on motions made prior to the verdict and thereafter no motion of any kind was made or only a motion for a new trial was made.

CONCLUSION.

For the reasons advanced above, it is urged that this Court should refuse to grant review by writ of certiorari.

Respectfully submitted,

EDWARD R. BRUMLEY,
Attorney for Respondent.

ROBERT M. PEET,
Of Counsel.

LIBRARY
SUPREME COURT, U.S.

Office - Supreme Court, U. S.
FILED
OCT 15 1952
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1952.

No. 40.

MARGARET JOHNSON, as Administratrix of the goods, chattels and credits of Charles Johnson, deceased,

Petitioner,

—against—

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY,

Respondent.

RESPONDENT'S BRIEF.

EDWARD R. BRUMLEY,
Counsel for Respondent,
Room 3841, Grand Central Terminal,
New York City.

ROBERT M. PEET,
Of Counsel.

THE COURT PRESS, N. Y. C.

INDEX.

	PAGE
Opinions of the Courts Below	1
Jurisdiction	1
Question Presented	2
Statutes Involved	2
Statement of the Case	2
Argument:	
POINT I—Respondent made a proper motion under Rule 50(b) which allowed the Court of Appeals to order judgment in its favor	5
POINT II—Even in the absence of a motion under Rule 50(b) after the verdict, the trial court's reservation of decision on respondent's motion for a directed verdict made prior to the verdict gave the Court of Appeals authority to order judgment for respondent	8
Conclusion	19
Appendix	21

TABLE OF CASES CITED:

Aetna Insurance Co. v. *Kennedy*, 301 U. S. 389 (1937)	14
Baltimore & Carolina Line, Inc. v. *Redman*, 295 U. S. 654 (1935)	14, 17, 18
Berry v. *United States*, 111 F. 2d 615 (C. C. A. 2, 1940)	15
Binder v. *Commercial Travelers Mut. Acc. Ass'n*, 165 F. 2d 896 (C. C. A. 2, 1947)	6
Boaz v. *Mutual Life Ins. Co. of New York*, 146 F. 2d 321 (C. C. A. 10, 1944)	12

PAGE

Colonna v. *Merchants & Miners Transportation Co.*, 112 Fed. 2d 612 (C. C. A. 4, 1940) 12

Cone v. *West Virginia Pulp & Paper Co.*, 330 U. S. 212 (1947) 15, 17, 18

Conway v. *O'Brien*, 111 F. 2d 611 (C. C. A. 2, 1940) .. 15

Cruz v. *New York*, 179 Misc. 1031, 43 N. Y. S. 2d 665 (1943) 16

Dougherty v. *Salt*, 227 N. Y. 200 (1919) 16

Eastern Livestock Co-op. M. Ass'n v. *Dickenson*, 107 F. 2d 116 (C. C. A. 4, 1939) 15

Evans v. *Teche Lines, Inc.*, 112 F. 2d 933 (C. C. A. 5, 1940) 12

Fleming v. *Harrison*, 162 F. 2d 789 (C. C. A. 8, 1947) 7

Fratta v. *Grace Line, Inc.*, 139 F. 2d 743 (C. C. A. 2, 1943) 11

Garman v. *Metropolitan Life Insurance Co.*, 175 F. 2d 24 (C. C. A. 3, 1949) 16

Gillis v. *Reicks*, 7 F. R. D. 205 (D. D. C., 1947) 7

Globe Liquor Co. v. *San Roman*, 332 U. S. 571 (1948) 16

Howard University v. *Cassell*, 126 F. 2d 6 (App. D. C., 1941), cert. den. 316 U. S. 675 15

International Shoe Co. v. *Cool*, 154 F. 2d 778 (C. C. A. 8, 1946), cert. den. 329 U. S. 726 12

Jaggers v. *Southeastern Greyhound Lines*, 126 F. 2d 762 (C. C. A. 6, 1942) 13

Kline v. *Yokom*, 117 F. 2d 370 (C. C. A. 7, 1941) 9

Limbershaft Sales Corp. v. *A. G. Spalding & Bros.*, 111 F. 2d 675 (C. C. A. 2, 1940) 8

Lowden v. *Bell*, 138 F. 2d 558 (C. C. A. 8, 1943) 15

Lowden v. *Denton*, 110 F. 2d 274 (C. C. A. 8, 1940), cert. den. 310 U. S. 652 15

PAGE

Lux v. *Western Casualty Co.*, 107 F. 2d 1002 (C. C. A. 5, 1939) 9

Montgomery Ward & Co. v. *Duncan*, 311 U. S. 243 (1940) 6, 12, 17

Moore v. *Chesapeake & Ohio R. Co.*, 340 U. S. 573 (1951) 6

Mullen v. *Fitz Simons & Connell Dredge & Dock Co.*, 11 F. R. D. 348 (N. D. Ill., 1950), modified 191 F. 2d 82 (7th Cir., 1951), cert. den. 342 U. S. 888, 9, 10, 11

Northern R. Co. v. *Page*, 274 U. S. 65 (1927) 13

Slocum v. *New York Life Ins. Co.*, 228 U. S. 364 (1913) 13, 14

Sykes v. *Bensinger Recreation Corp.*, 39 F. Supp. 952 (E. D. Wis., 1941) 13

United States v. *Halliday*, 116 F. 2d 812 (C. C. A. 4, 1941) 15

Western Union Telegraph Co. v. *Dismang*, 106 F. 2d 362 (C. C. A. 10, 1939) 8

West Virginia Pulp & Paper Co. v. *Cone*, 153 F. 2d 576 (C. C. A. 4, 1946) 15

Young v. *John McShain, Inc.*, 130 F. 2d 31 (C. C. A. 4, 1942) 12

OTHER AUTHORITIES CITED:

38 A. B. A. Rep. 541, 561-568 (1913) 13

Advisory Committee on the Rules of Civil Procedure, 1946 Report of Proposed Amendments to the Rules 18

47 Am. L. Rev. 906 (1913); Comment 13

Civil Practice Act, Section 457-a 16

Clark and Moore, *A New Federal Procedure*, 44 Yale L. J. 387, 407-408 (1935) 18

PAGE

13 Col. L. Rev. 544 (1913), Case Note 13

47 Col. L. Rev. 1077 (1947), Note, *Restricted Power of Federal Appellate Courts to Order Judgment Notwithstanding Verdict* 16

Federal Rules of Civil Procedure, 28 U. S. C. A. following Section 723c:

Rule 50 ..... 2, 21

Rule 50(a) 21

Rule 50(b) 5, 6, 7, 8, 9, 14, 16, 17, 18, 20, 21, 22

Rule 59 ..... 2, 17, 22

26 Green Bag 106 (1914), Comment 13

26 Har. L. Rev. 738 (1913), Comment 13

61 Har. L. Rev. 889 (1948), Case Note 16

Ilsen and Hone, *Federal Appellate Practice as Affected by the New Rules of Civil Procedure*, 24 Minn. L. Rev. 1, 18 (1939) 18

Jones Act, 46 U. S. C. §688 1

34 Mich. L. Rev. 93 (1935), Comment 18

Moore, *Federal Practice*, Volume 5 (2nd ed., 1951):

Page 2331, n. 5 14

Page 2338 16

Scott, *The Reform of Civil Procedure*, 31 Har. L. Rev. 669, 688-689 (1918) 13

Simkins, *Federal Practice*, §637, p. 484 (3rd ed., Schweppe, 1938) 14

Thayer, *Judicial Administration*, 63 U. of Pa. L. Rev. 585, 587-601 (1915) 13

Thorndyke, *Trial by Jury in the United States*, 26 Har. L. Rev. 732 (1913) 13

28 U. S. C. §1254(1) 2

23 Yale L. J. 454, 455-459 (1914), Comment 13

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1952.

No. 40.

MARGARET JOHNSON, as Administratrix of the goods, chattels and credits of Charles Johnson, deceased,

Petitioner,

—against—

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY,

Respondent.

RESPONDENT'S BRIEF.

Opinions of the Courts Below.

The opinion of Judge Abruzzo of the United States District Court for the Eastern District of New York is not officially reported but appears in the record on appeal at pages 159 to 164.

The opinion of the United States Court of Appeals for the Second Circuit written by Judge Swan is officially reported in 194 F. 2d 194 and appears at the end of the record on appeal at pages 171 to 175.

Jurisdiction.

This action to recover damages for the death of Charles Johnson on April 22, 1946 was presumably brought under the Jones Act, 46 U. S. C. §688 (R. 4-6, 162). Jurisdiction

of this Court under 28 U. S. C. §1254(1) is alleged. The judgment of the Court of Appeals was rendered on February 4, 1952 (R. 176). Petition for writ of certiorari was filed on April 22, 1952. Certiorari limited to a review of the procedural issue only and placing the case on the summary docket was granted on June 9, 1952 (R. 177).

Question Presented.

Petitioner has not accurately stated the issue before this Court. The true question presented is: Did the Court of Appeals for the Second Circuit have authority to reverse the judgment for petitioner and order judgment for respondent on the ground that petitioner's failure to prove causal connection between the asserted negligence and the death required that respondent's motion for a directed verdict made at the close of all the evidence should have been granted, where the trial judge expressly reserved decision on this motion and also on all but the last ground of respondent's post-verdict motion to set aside the verdict as contrary to the law, contrary to the evidence, contrary to the weight of the evidence and excessive?

Statutes Involved.

Rules 50 and 59 of the Federal Rules of Civil Procedure, 28 U. S. C. A. following Section 723c, are set forth in an Appendix.

Statement of the Case.

Part of petitioner's brief (pp. 3-10) is devoted to arguing the merits of the Court of Appeals' decision that there was no proof of causal connection between the asserted negligence and the death. Because certiorari as granted was limited to the procedural issue only, respondent does

not here attempt to answer the arguments or correct the omissions and misleading impressions of this portion of petitioner's brief. Respondent will set forth here only what procedural steps were taken at the trial and upon the subsequent appeal, and such underlying facts as are necessary to understand the procedural issue.

Petitioner's opening statement made to the jury on April 10, 1951, failed to list even one item of negligence, and was deemed by the trial court to be very faulty (R. 38). Right after the opening statements to the jury, petitioner moved to amend her complaint, pursuant to a notice to amend served on respondent on March 6, 1951, so as to allege as an additional ground of negligence respondent's failure to exercise reasonable care to rescue Charles Johnson after his absence became known (R. 8-9). This motion was granted (R. 9). The complaint prior to this amendment had alleged as negligence (1) careless operation of the tug in removing the carfloats, (2) failure to give Johnson a reasonable opportunity to remount the carfloat, (3) failure to furnish a safe and secure place in which to work, and (4) starting the tug in such a manner as to precipitate Johnson into the river.

During the examination of the first witness in the trial, petitioner attempted to bring out the presence of oil on "Carfloat 53" (R. 38). The trial judge ruled that it was then too late to inject into the case for the first time a claim of negligence based on the presence of oil, but offered to allow petitioner to amend her complaint to make such a claim and to try her case before a new jury a month later (R. 38-39). Petitioner decided not to take advantage of this offer (R. 39).

At the close of petitioner's case, respondent moved to dismiss the complaint for failure to prove negligence, for failure to make out a *prima facie* case, and for failure to put in sufficient proof (R. 102). The trial judge re-

served decision on the motion (R. 105). He indicated at that time that the only issue he intended to submit to the jury was the one based on the expert's testimony as to the practice of not pulling out from the pier until the floatman was known to be safely aboard, and petitioner stated that no exception was being taken to this (R. 104).

At the close of all the evidence respondent renewed its earlier motion to dismiss the complaint on the same grounds, and also moved for a directed verdict in its favor on the same grounds and for failure to prove negligence and because Johnson was responsible for his own death (R. 133). The trial judge reserved decision (R. 134). He then again outlined the limited issue which he intended to submit to the jury, barring all theories of negligence based on failure to rescue Johnson, to which petitioner took exception (R. 133-135).

After a verdict for $20,000 in favor of petitioner was rendered on April 13th, respondent moved at once to set it aside as contrary to the law, contrary to the evidence, contrary to the weight of the evidence and excessive (R. 145). The trial judge denied that part of the motion based on excessiveness, but called for the parties to submit briefs as to the rest of the motion after receipt of the transcribed minutes of the trial but by May 21st (R. 145). After exchange of main briefs, two days was allowed for reply briefs (R. 145-146). Judgment on the verdict was ordered to be entered (R. 145).

Respondent served on petitioner a brief in which it urged among other things that petitioner had failed to prove any causal connection between the alleged negligence and the death, and this issue was also discussed in petitioner's brief.

The trial judge wrote an opinion dated June 20th rejecting respondent's contentions, denying its motion, and

allowing the verdict to stand (R. 159-164). Thereafter on June 29th he signed an order reciting the history of the motions set forth above and denying them (R. 164-165).

On appeal to the Court of Appeals, respondent urged the same grounds for reversal as it had in the District Court. The Court of Appeals unanimously concluded that no causal connection between the alleged negligence and the death had been proven, and that respondent's motion for a directed verdict should have been granted (R. 171-175). Accordingly, judgment for petitioner was reversed and mandate in accordance with the decree was ordered issued to the District Court (R. 176).

This Court granted certiorari limited to a review of the issue raised as to the application of Rule 50(b) of the Rules of Civil Procedure (R. 177).

ARGUMENT

POINT I

Respondent made a proper motion under Rule 50(b) which allowed the Court of Appeals to order judgment in its favor.

Petitioner's entire argument is based on the misconception that respondent made no motion under Rule 50(b) after the verdict. Petitioner concedes (Brief, pp. 17, 26) that if such a motion was made, the disposition of the case made by the Court of Appeals is not open to challenge. Petitioner's concession in this respect follows the most recent practice recognized by this Court as correct.

Moore v. *Chesapeake & Ohio R. Co.*, 340 U. S. 573 (1951).

See:

Montgomery Ward & Co. v. *Duncan*, 311 U. S. 243, 254 (1940).

The motion made by respondent after the verdict was brought in against it was intended to be a motion for judgment in its favor or for a new trial. Rule 50(b) allows these two motions to be combined. No objection as to the adequacy of the motion was raised either by the District Court or by the Court of Appeals, both of which were presumably familiar with the earlier decisions of this Court on the subject, or even by petitioner until she sought certiorari.

That part of respondent's motion which sought to set aside the verdict as contrary to the law and the evidence was the equivalent of a motion for judgment for respondent under Rule 50(b) and was apparently so treated by the trial judge. His exercise of discretion in this respect is not reviewable here.

Cf. Binder v. *Commercial Travelers Mut. Acc. Ass'n*, 165 F. 2d 896 (C. C. A. 2, 1947), where the Court of Appeals accepted the interpretation of the District Court that a motion by defendant to set aside the verdict and for a directed verdict constituted also a motion for a new trial even though the motion did not specifically mention any request for a new trial.

That part of respondent's motion which asked to set aside the verdict as contrary to the weight of the evidence and excessive was in effect a motion for a new trial on the specified grounds. There is no other reasonable way of interpreting the language used, particularly in the light of respondent's pre-verdict motions, which were still before the court as a result of its express reservation.

Cf. Gillis v. *Reicks*, 7 F. R. D. 205 (D. D. C., 1947), where the trial court held that the inclusion in support of a motion to set aside the verdict and for judgment notwithstanding the verdict of one ground appropriate only to a motion for a new trial gave authority to grant a new trial.

The points urged by both parties in their briefs to the trial judge were specifically directed toward his granting or not granting judgment for respondent. The same was true of their briefs in the Court of Appeals. Obviously respondent did not merely want the verdict to be set aside but wanted the relief that invariably follows such a setting aside on the grounds urged: a judgment in its favor or a new trial. Respondent, under reasonable rules of interpretation, was entitled to have its motion to set aside treated as an alternative motion under Rule 50(b) for judgment or a new trial.

Petitioner's objection (Brief, p. 11) that respondent failed to set forth the specific ground of lack of causal connection between the alleged negligence and the death in support of its motions overlooks the fact that the grounds urged were broad enough to include this one (R. 102, 133, 145) and that this very argument was discussed in the briefs on the motions submitted to the court by both parties. Moreover, petitioner's failure to object previously to the motions on this score prevents a review of the alleged error now.

Fleming v. *Harrison*, 162 F. 2d 789 (C. C. A. 8, 1947).

POINT II.

Even in the absence of a motion under Rule 50(b) after the verdict, the trial court's reservation of decision on respondent's motion for a directed verdict made prior to the verdict gave the Court of Appeals authority to order judgment for respondent.

Respondent has set forth under its first Point the reasons why it believes this Court must accept its contention that a motion under Rule 50(b) was made after the verdict. Even if its contention in this respect were to be rejected, respondent will demonstrate in its second Point why the Court of Appeals had authority in the absence of a motion under Rule 50(b) to order judgment for respondent.

At the end of all the evidence respondent moved for a directed verdict in its favor (R. 133). The trial court reserved decision on this motion (R. 134). By order dated June 29, 1951, the court denied this motion (R. 164-165). The court had this motion under consideration from April 12, 1951 to June 29, 1951. The verdict was received on April 13, 1951 (R. 144-145). It would have been an act of supererogation for respondent, under these circumstances, within ten days after April 13, 1951, to have made a motion, as allowed by Rule 50(b), to have judgment entered in accordance with its motion for a directed verdict.

In *Limbershaft Sales Corp.* v. *A. G. Spalding & Bros.*, 111 F. 2d 675 (C. C. A. 2, 1940), the Court of Appeals held it had power to reverse and direct judgment of dismissal on the merits where the trial court had reserved decision on defendant's motion at the close of the evidence for a directed verdict. The Court of Appeals treated the case at bar in the same way.

Under similar circumstances, the same powers were exercised by the Courts of Appeals in *Western Union Telegraph Co.* v. *Dismang*, 106 F. 2d 362 (C. C. A. 10, 1939),

and in *Lux* v. *Western Casualty Co.*, 107 F. 2d 1002 (C. C. A. 5, 1939).

In *Kline* v. *Yokom*, 117 F. 2d 370 (C. C. A. 7, 1941), the defendant at the close of all the evidence made a written motion for a directed verdict. The trial judge reserved decision on the motion. More than ten days after the verdict, a hearing on the motion was held. At that time defendant presented his motion in amended form. The District Court granted the motion in its amended form. On appeal, as the briefs show, it was argued by plaintiff that in the absence of a proper motion under Rule 50(b) after the verdict, neither the trial nor the appellate court could grant defendant's motion for a directed verdict. This argument the Court of Appeals rejected by affirming the judgment for defendant.

In *Mullen* v. *Fitz Simons & Connell Dredge & Dock Co.*, 11 F. R. D. 348 (N. D. Ill., 1950), modified 191 F. 2d 82 (7th Cir., 1951), cert. den. 342 U. S. 888, the trial court reserved decision on a motion for a directed verdict made by defendant at the close of all the evidence with respect to plaintiff's three causes of action. After a verdict for plaintiff, the trial court set a date for oral argument on the reserved motion, heard argument on the date set, and granted the motion, even though defendant had made no post-verdict motion under Rule 50(b). The Court of Appeals affirmed as to the first cause of action and ordered a new trial as to the second and third causes of action. This Court refused to review the case. In support of its position, the trial court said (p. 350):

> "*Baltimore & Carolina Line, Inc.* v. *Redman*, 295 U. S. 654, indicates the desirability of lodging power in the trial judge to reserve motions for decision after he has had the benefit of argument. The parties benefit from considered disposition of reserved motions. The plaintiff's suggestion that the court may lose jurisdiction over the motion it has itself reserved unless one of the parties to the liti-

gation takes action of some kind is at variance with reason and practice.

"Nor, contrary to plaintiff's assertion, does Rule 50(b) lead to that result. The rule was framed to *extend* the application of the *Redman* case, *supra*. Expansion of the reservation device used by the court in the *Redman* case and in the case at bar was intended—not a contraction which would remove from the trial court the power to reserve and hear argument on its own initiative in the interest of the 'considered rulings' of which the court spoke in the *Redman* case. Nowhere in Rule 50(b) is there evidence of any intention to take from the court its power without any action by a party to reserve a motion at the end of all the evidence and later dispose of that motion after reception of a verdict.

"Plaintiff seems to disregard the facts and to assume that the motion in issue has arisen *after* reception of the verdict. His memorandum is directed to that assumption, as is evidenced by his reliance on *Southeastern Greyhound Lines* v. *McCafferty*, 169 F. (2d) 1, a case in which no motion was made before submission of the case to the jury and hence no reservation, actual or assumed, arose.

"But the situation and rule plaintiff argues is not involved in this case. Rule 50(b)'s provision for automatic reservation of a motion, with its sanction for timely action by the moving party after verdict, is not the source of the court's power to determine this motion. The motion at issue was made at the conclusion of all the evidence *before* a verdict was returned. The reservation was by the court. On the day following the return of the verdict, the court set the reserved motion for argument. This court has power to proceed as it has done in deciding the ruling to be made on a motion for a directed verdict. The motion on which defendant is relying is not the motion after verdict contemplated in Rule 50(b).

"The rule that plaintiff would borrow from Rule 50(b) to defeat a prerogative of the court which antedates the liberalizing Federal rules (*Baltimore & Carolina Line* v. *Redman, supra*) cannot be applied in this dissimilar situation—to a pending motion, seasonably made and reserved by the court, coming on for argument at the time set by the court. *Kline* v. *Yokam, supra.*"

It is perfectly clear that a trial judge has power to reserve decision on a motion for a directed verdict made at the close of all the evidence. It is equally clear that his disposition of such a reserved motion may be reviewed on appeal. See *Frattă* v. *Grace Line, Inc.*, 139 F. 2d 743, 744 (C. C. A. 2, 1943). No reason suggests itself why an appellate court upon such a review may not in its discretion, as a matter of law, finally dispose of such a case, where no alternative relief is requested and none is appropriate, instead of ordering a new trial. It has long been recognized that prolonging litigation and piling up court costs and attorney's fees is neither in the best interests of the courts, with their congested calendars, nor of the parties, who desire speedy, inexpensive relief. In passing on a reserved motion for a directed verdict, the trial judge may secure a thorough briefing of the issues and take time for full deliberation on the case. He can then, in a way he could not during the rush of a trial, exercise his judgment intelligently to grant or deny the motion or, if justice requires, to order a new trial.

Ordering a new trial in the case at bar or remanding the case to the District Court to determine whether a new trial should be granted would under the circumstances be both improper and futile. The trial court has already refused to allow petitioner, because of her laches and the resulting unfairness to respondent, to introduce a new concept of liability based on the presence of oil on one of the carfloats (R. 38). Petitioner did not even try

to amend her complaint to allow such proof when at the start of the trial she amended it to allege liability for failure to make timely rescue (R. 8-9), nor did she mention it in her opening to the jury (R. 38), and she refused to take a voluntary nonsuit and proceed to trial a month later with the complaint amended so as to allege the liability based on the presence of oil (R. 38-39). The trial court refused as a matter of law to submit to the jury petitioner's theory of liability based on failure to effect timely rescue, relying in part on *Colonna* v. *Merchants & Miners Transportation Co.*, 112 F. 2d 612 (C. C. A. 4, 1940) (R. 104, 133). No issue of fact on this question is available to be retried. The trial court has fully considered both these grounds for a retrial now urged by petitioner and rejected them. Petitioner did not cross-assign this rejection as error in the Court of Appeals, as it should have pursuant to this Court's dictum in *Montgomery Ward & Co.* v. *Duncan*, 311 U. S. 243, 254 (1940).

For the trial court to have ordered a voluntary dismissal, if one had been requested, at so late a stage in the proceedings as after the verdict would have been improper and might have constituted an abuse of its discretion.

International Shoe Co. v. *Cool*, 154 F. 2d 778 (C. C. A. 8, 1946), cert. den. 329 U. S. 726;
Boaz v. *Mutual Life Ins. Co. of New York*, 146 F. 2d 321 (C. C. A. 10, 1944);
Young v. *John McShain, Inc.*, 130 F. 2d 31 (C. C. A. 4, 1942);
Evans v. *Teche Lines, Inc.*, 112 F. 2d 933 (C. C. A. 5, 1940).

Respondent, for its part, does not now seek a retrial and did not ask for one from the Court of Appeals. The trial court has denied its motion for a new trial in refusing to set aside the verdict. The issue of causation has been

fully tried out; and the only living eye witnesses have testified. Petitioner clearly has no right to have it retried, nor would such a retrial serve any useful purpose.

Cf. Sykes v. *Bensinger Recreation Corp.*, 39 F. Supp. 952 (E. D. Wis., 1941);
Jaggers v. *Southeastern Greyhound Lines*, 126 F. 2d 762 (C. C. A. 6, 1942).

An analysis of the cases cited by petitioner in reviewing the historical development of the issue at bar reveals the soundness of respondent's position. The decision of this Court in *Slocum* v. *New York Life Ins. Co.*, 228 U. S. 364 (1913), which set up a constitutional barrier to ordering a judgment notwithstanding the verdict where determination of the prior motion for a directed verdict had not been reserved, came as a great surprise to practitioners of that era. It was strongly attacked at the time by the four dissenting justices and by commentators.

Thorndyke, *Trial by Jury in the United States*, 26 Har. L. Rev. 732 (1913);
Thayer, *Judicial Administration*, 63 U. of Pa. L. Rev. 585, 587-601 (1915);
Scott, *The Reform of Civil Procedure*, 31 Har. L. Rev. 669, 688-689 (1918);
38 A. B. A. Rep. 541, 561-568 (1913);
Comment, 47 Am. L. Rev. 906 (1913);
Comment, 26 Har. L. Rev. 738 (1913);
Comment, 23 Yale L. J. 454, 455-459 (1914);
Comment, 26 Green Bag 106 (1914);
Case Note, 13 Col. L. Rev. 544 (1913).

This Court first departed from the rigidity apparently imposed by its decision in the *Slocum* case, *supra*, in *Northern R. Co.* v. *Page*, 274 U. S. 65 (1927), where it upheld the Massachusetts practice of submitting alternative verdicts to the jury and thereafter allowing the trial

or appellate court as a matter of law to order judgment for the party against whom the verdict was rendered.

The *Slocum* case decision was ultimately clarified and broadened considerably in *Baltimore & Carolina Line, Inc.* v. *Redman*, 295 U. S. 654 (1935), where this Court recognized the power of a federal judge at common law or under state practice to reserve decision on a motion for a directed verdict and after the verdict to grant or deny the reserved motion without its having been renewed, and also recognized the power of an appellate court to review this decision of the trial judge, and to grant or deny the motion if he should have done so.

In *Aetna Insurance Co.* v. *Kennedy*, 301 U. S. 389 (1937), this Court in the first ground for its decision apparently reaffirmed the *Slocum* case, but is believed to have given indication in stating the second ground for its decision that the Pennsylvania practice of allowing a judgment notwithstanding the verdict even where no decision had been reserved on the earlier motion for a directed verdict would not be held unconstitutional.

Moore, *Federal Practice*, Vol. 5, p. 2331, n. 5 (2nd ed., 1951);
Simkins, *Federal Practice*, §637, p. 484 (3rd ed., Schweppe, 1938).

In order to be sure to allow a court constitutionally to act after the verdict on an earlier motion for a directed verdict which had been denied, the drafters of the new Federal Rules of Civil Procedure resorted to the fiction of a presumed reservation, so as to bring the situation within the doctrine of the *Redman* case. In order to get the trial judge to act on a motion for a directed verdict which he had already denied, the party whose motion had been denied was authorized to renew it. Nothing was said, however, in Rule 50(b) about the situation where

the trial judge specifically reserved decision on the motion for a directed verdict and consequently had it before him for action after the verdict without its being renewed.

After the adoption in 1938 of the new Federal Rules of Civil Procedure, it was widely assumed that a Court of Appeals had power to order judgment for the party which lost the verdict below even where no post-verdict motion for judgment in its favor had been made and decision had not been specifically reserved on its earlier motion for a directed verdict.

Eastern Livestock Co-op. M. Ass'n v. *Dickenson*, 107 F. 2d 116 (C. C. A. 4, 1939);
Lowden v. *Denton*, 110 F. 2d 274 (C. C. A. 8, 1940), cert. den. 310 U. S. 652;
Conway v. *O'Brien*, 111 F. 2d 611 (C. C. A. 2, 1940);
Berry v. *United States*, 111 F. 2d 615 (C. C. A. 2, 1940);
United States v. *Halliday*, 116 F. 2d 812 (C. C. A. 4, 1941);
Howard University v. *Cassell*, 126 F. 2d 6 (App. D. C., 1941), cert. den. 316 U. S. 675;
Lowden v. *Bell*, 138 F. 2d 558 (C. C. A. 8, 1943);
West Virginia Pulp & Paper Co. v. *Cone*, 153 F. 2d 576 (C. C. A. 4, 1946).

In the last-cited case, this Court reversed the Circuit Court of Appeals, and held that where decision had not been specifically reserved on defendant's motion for a directed verdict and where defendant had made no motion after the verdict except one for a new trial on the ground of freshly discovered evidence, judgment in his favor could not be ordered by the appellate court but only a new trial.

Cone v. *West Virginia Pulp & Paper Co.*, 330 U. S. 212 (1947).

The power of appellate courts was further limited in *Globe Liquor Co.* v. *San Roman*, 332 U. S. 571 (1948). There both sides in a jury trial moved for a directed verdict at the close of all the evidence, and the trial court then directed a verdict for plaintiff. The defendant's only motion thereafter was one for a new trial. The Circuit Court of Appeals ordered judgment for defendant, but this Court held that it could order only a new trial.

The restrictive nature of both these decisions has been commented upon by writers and courts.

Note, *Restricted Power of Federal Appellate Courts to Order Judgment Notwithstanding Verdict*, 47 Col. L. Rev. 1077 (1947);
Case Note, 61 Har. L. Rev. 889 (1948);
Moore, *Federal Practice*, Vol. 5, p. 2338 (2d ed., 1951);
Garman v. *Metropolitan Life Insurance Co.*, 175 F. 2d 24 (C. C. A. 3, 1949).

It is clear from the review of the cases made thus far that this Court has never decided the precise question here presented and that the Courts of Appeals for the Second, Fifth, Eighth and Tenth Circuits have decided this question in respondent's favor. The New York courts, even before Section 457-a of the Civil Practice Act was amended to its present form, had reached the same conclusion as these four Circuit Courts on the basis of similar reasoning.

Cruz v. *New York*, 179 Misc. 1031, 43 N. Y. S. 2d 665 (1943);
Dougherty v. *Salt*, 227 N. Y. 200 (1919).

Petitioner overlooks the permissive nature of the wording of Rule 50(b). It says that within ten days after the reception of a verdict a party who has moved for a

directed verdict "may", not "shall" or "must", move for judgment in accordance with his motion for a directed verdict. He "may" also join with this a motion for a new trial. He may instead make a separate motion under Rule 59 for a new trial.

Where a party's motion for a directed verdict has been denied, he will of course want to move after the verdict under Rule 50(b) to try to change the trial judge's mind and to compel him to resolve the issue. In fact, as appears from the *Cone* case, he must do so in order fully to protect his rights on appeal. But where decision has been specifically reserved on a party's motion for a directed verdict and argument or briefs requested, he need not uselessly repeat the motion already before the court unless he should desire to set forth further or more distinct grounds in support of his motion or unless he should desire to combine his earlier motion with one for a new trial, as allowed by Rule 50(b). If the act of reserving decision is to mean anything and is to avoid deceiving the attorneys and the court as to what it means, that act must give the court power after rendition of a verdict to set it aside and order judgment contrary to the verdict. The trial court in determining the reserved motion may at its leisure review all aspects of the case and grant whatever relief may be appropriate.

The enactment of Rule 50(b) did not take away from the courts their common law powers. As this Court said in *Montgomery Ward & Co.* v. *Duncan*, 311 U. S. 243, 250 (1940), Rule 50(b) "adds nothing of substance to rights of litigants heretofore existing and available through a more cumbersome procedure". The flexibility of action gained for the courts in the *Redman* case in handling cases where the only motion made is one at the close of all the evidence for a directed verdict on which decision has been specifically reserved, should not now be cast aside.

The Advisory Committee on the Rules of Civil Procedure in its 1946 Report of Proposed Amendments to the Rules sought to amend Rule 50(b) to make it clear that such power existed under Rule 50(b) without any post-verdict motion. It is not known whether this Court rejected the amendment because it believed it to be superfluous in view of its forthcoming decision in the *Cone* case, because it wished to consider the question further after increased experience, because it was opposed to such a change, or because it had some other reason in mind. From the decisions already referred to, it would appear that the Courts of Appeals, regardless of any change in Rule 50(b), would welcome a reaffirmation of the fact that they still have the power which the *Redman* case recognized in them. The commentators mentioned above favor this result too. Note also:

Clark and Moore, *A New Federal Procedure*, 44 Yale L. J. 387, 407-408 (1935);

Ilsen and Hone, *Federal Appellate Practice as Affected by the New Rules of Civil Procedure*, 24 Minn. L. Rev. 1, 18 (1939);

Comment, 34 Mich. L. Rev. 93 (1935).

But even without the alteration sought by the Advisory Committee in Rule 50(b), the trial court has power independent of Rule 50(b) under a specific reservation to grant a directed verdict without the motion having been renewed after the verdict. To grant it the power to act in the one case but not in the other would be to create a distinction in form where none exists in substance. In each case the same motion raising the same points of law is before the trial court at the same time. The only differenee lies in the mechanics by which the two motions are brought before the court: in one case by its own specific reservation and in the other case through the renewal by a party of its earlier denied motion. In each case the party which won the verdict is

fully aware that the motion is pending before the court and may take whatever steps seem desirable in the way of argument, briefing, or motions to protect against a subsequent adverse ruling by the trial or appellate court. In each case the trial court has ample time for such argument, briefing and mature deliberation as the matter calls for, and may award whatever relief justice between the parties appears to require. Since both motions are for all material purposes similar, an appellate court should have power to treat them in the same way.

CONCLUSION.

It is urged that the judgment of the Court of Appeals for the Second Circuit should be affirmed.

Respectfully submitted,

EDWARD R. BRUMLEY,
Counsel for Respondent.

ROBERT M. PEET,
Of Counsel.

APPENDIX.

Federal Rules of Civil Procedure, 28 U. S. C. A. following Section 723c.

"RULE 50.

Motion for a Directed Verdict.

(a) *When Made: Effect.* A party who moves for a directed verdict at the close of the evidence offered by an opponent may offer evidence in the event that the motion is not granted, without having reserved the right so to do and to the same extent as if the motion had not been made. A motion for a directed verdict which is not granted is not a waiver of trial by jury even though all parties to the action have moved for directed verdicts. A motion for a directed verdict shall state the specific grounds therefor.

(b) *Reservation of Decision on Motion.* Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Within 10 days after the reception of a verdict, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict; or if a verdict was not returned such party, within 10 days after the jury has been discharged, may move for judgment in accordance with his motion for a directed verdict. A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative. If a verdict was returned the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed. If no verdict was returned the court may direct the entry of judgment

as if the requested verdict had been directed or may order a new trial."

"RULE 59.

New Trials; Amendment of Judgments.

(a) *Grounds.* A new trial may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States; and (2) in an action tried without a jury, for any of the reasons for which rehearings have heretofore been granted in suits in equity in the courts of the United States. On a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment.

(b) *Time for Motion.* A motion for a new trial shall be served not later than 10 days after the entry of the judgment.

(c) *Time for Serving Affidavits.* When a motion for new trial is based upon affidavits they shall be served with the motion. The opposing party has 10 days after such service within which to serve opposing affidavits, which period may be extended for an additional period not exceeding 20 days either by the court for good cause shown or by the parties by written stipulation. The court may permit reply affidavits.

(d) *On Initiative of Court.* Not later than 10 days after entry of judgment the court of its own initiative may order a new trial for any reason for which it might have granted a new trial on motion of a party, and in the order shall specify the grounds therefor.

(e) *Motion to Alter or Amend a Judgment.* A motion to alter or amend the judgment shall be served not later than 10 days after entry of the judgment."